Supreme Court, U.S.
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In The Supreme Court of the United States

MARY D. POLLARD,

Petitioner,

v.

HIGH'S OF BALTIMORE, INCORPORATED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

David W. Skeen
WRIGHT, CONSTABLE & SKEEN, L.L.P.
100 North Charles Street, 16th Floor
Baltimore, Maryland 21201
(410) 659-1305

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

5999

QUESTIONS PRESENTED

WHAT ARE THE STANDARDS FOR DETERMINING WHETHER THE ADA'S DEFINITION OF DISABILITY COVERS A BACK IMPAIRMENT THAT, ACCORDING TO EXPERT MEDICAL TESTIMONY, SIGNIFICANTLY RESTRICTS AN INDIVIDUAL, AS COMPARED TO THE AVERAGE PERSON, IN THE ACTIVITIES OF LIFTING, STANDING, BENDING, STOOPING, KNEELING, AND REMAINING IN ONE POSITION, AND WHICH, ACCORDING TO EXPERT VOCATIONAL TESTIMONY, FORECLOSES THAT INDIVIDUAL FROM MORE THAN SEVENTY PERCENT OF JOBS IN THE RELEVANT LABOR MARKETS?

WHAT ARE THE STANDARDS FOR DETERMINING WHETHER AN EMPLOYER REGARDS AN INDIVIDUAL WITH AN IMPAIRMENT AS DISABLED IN ONE OR MORE MAJOR LIFE ACTIVITIES, INCLUDING WORKING?

LIST OF PARTIES

The Petitioner is Mary D. Pollard.

The Respondent is High's of Baltimore, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mary D. Pollard respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 25, 2002 in order to review the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Pollard v. High's of Baltimore, Inc., 281 F.3d 462, 2002 U.S. App. LEXIS 13759 (4th Cir. 2/25/02), is set forth in the Appendix hereto. App. 1a.

The Memorandum Opinion of the United States District Court for the District of Maryland (Northern Division) is unreported and is set forth in the Appendix hereto. App. 15a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District of Maryland (Northern Division) was entered on February 25, 2002. App. 1a. On March 25, 2002, the Court of Appeals denied the petition for rehearing and rehearing en banc. This petition for a writ of certiorari is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12102(2)

Disability. The term disability means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

Petitioner brought this action under the Americans with Disabilities Act of 1990 (the "ADA") against Respondent, invoking 28 U.S.C. §§ 1331 and 1343 as bases for federal jurisdiction.

An orthopedic physician has opined that, on a permanent basis, Petitioner's back injury significantly restricts her, as compared to the average person, in the activities of standing, lifting, bending, stooping, kneeling, and remaining in one position. A vocational expert has opined that the impairment forecloses Petitioner from more than 70% of jobs in the relevant labor markets.

Petitioner suffered the injury on August 25, 1997 while employed by Respondent as an Area Supervisor overseeing numerous convenience stores operated by Respondent. The injury forced Petitioner to alternate between working in physical misery, and taking leave on doctor's orders, until January 1998, when she underwent diskectomy surgery for the injury and began rehabilitation efforts.

In June 1998, an orthopedic physician and a rehabilitation expert concluded that Petitioner was ready to return to her Area Supervisor job, with certain accommodations.

Respondent resisted, stating in August 1998 that it didn't want Petitioner back until she could "lift more," and telling Petitioner on September 18 that it would not allow her to return to her Area Supervisor job unless she first worked

as a store clerk, a much-more-physically-demanding job than Area Supervisor.

Determined to regain her Area Supervisor job, Petitioner acceded and worked as a store clerk from September 23 to October 29, 1998. The store-clerk duties inflicted debilitating back-related pain and humiliation on Petitioner – on top of financial duress: Respondent paid Petitioner only $5.60 per hour, or $12,000 annualized, as a store clerk, while she'd earned approximately $40,000 annually as an Area Supervisor.

While working as store clerk, Petitioner begged Respondent for her Area Supervisor job, providing Respondent in late September with a note from her orthopedist stating – once again - that she was ready to return to her Area Supervisor job, with certain restrictions.

Respondent stonewalled. On October 16 and 27, its Operations Manager stated that "it appeared to" him that Petitioner might be unable to increase her tolerance for work and that he was "not optimistic" about her anticipated improvement.

In physical, emotional, and financial despair, Petitioner left Respondent's employ on October 29, having concluded that Respondent was placing the Area Supervisor position out of her reach – because of her back impairment.

Petitioner then brought this action, claiming that, under the ADA, she is an individual with a disability, because her back impairment substantially limits her in one or more major life activities (including working) and/or she was regarded as being so substantially limited by

Respondent; and that Respondent discriminated against her in violation of the ADA by refusing to return her to her Area Supervisor job (even though physicians and a vocational expert said she could perform that job with accommodations) and constructively discharging her.

The District Court held that Petitioner is not disabled and, based on similar reasoning, the Fourth Circuit affirmed. Focusing primarily on the notes of doctors who were trying to facilitate Petitioner's return to her Area Supervisor job (and who were not focusing on the mixed factual-legal question of whether Petitioner's impairment is substantially limiting under the ADA), the Fourth Circuit concluded that Petitioner's back impairment does not substantially limit her in any major life activity, and that Petitioner therefore has no actual disability. App. 7a-10a. It further held that Respondent did not regard Petitioner as disabled, stating that the "evidence indicates that [Respondent] believed that [Petitioner's] work limitations were temporary and that she would eventually, if not soon, return to her [Area Supervisor] duties." App. 11a n. 5. In reaching that conclusion, the Fourth Circuit disregarded the fact that Respondent refused to return Petitioner to her Area Supervisor job even though physicians and a vocational expert said she could do so with accommodations, and that Respondent's Operations Manager stated, after witnessing the debilitating pain that Petitioner experienced while trying to perform the physically-demanding store-clerk job (which Respondent forced Petitioner to perform as a condition of returning to the Area Supervisor job), that "it appeared to" him that Petitioner might not be able to increase her tolerance for work and that he was "not optimistic" about Petitioner's anticipated improvement.

REASONS FOR GRANTING THE WRIT

I. THE RESULT REACHED BY THE FOURTH CIRCUIT ON THE ISSUE OF WHETHER PETITIONER'S IMPAIRMENT SUBSTANTIALLY LIMITS HER IN ANY MAJOR LIFE ACTIVITY, AND THE STANDARDS WHICH THE FOURTH CIRCUIT USED TO REACH THAT DECISION, CONFLICT WITH THE DECISIONS AND STANDARDS ENDORSED BY OTHER CIRCUITS AND THIS COURT.

Other Circuits have held that the ADA's definition of disability covers impairments imposing limitations equally or less severe than Petitioner's limitations. In Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996), the Seventh Circuit held that a shoulder injury which permanently precluded a coal miner from "overhead [and] heavy lifting" and "pushing and pulling out from his body" could qualify as a disability. Citing the back-injury example in 29 C.F.R. § 1630.2(j), the Court stated:

> The physical restrictions Cochrum's physician placed upon him – no overhead work, heavy lifting, or pulling or pushing out from his body – might apply to a broad range of jobs, and are more than job specific. As with the examples of the bad back in the regulations, Cochrum's shoulder injury could disqualify him from any position at the mine, or in related work such as construction. In addition to listing a number of jobs in the mine, the magistrate

> judge seems to have assumed as a matter of law that plenty of places would employ Cochrum with his shoulder condition. But given the breadth of his physician's physical restrictions, a reasonable jury could conclude that Cochrum's shoulder impairment does substantially limit his ability to work. 102 F.3d at 911.

In Burns v. Coca-Cola Enterprises, Inc., 222 F.3d 247 (6th Cir. 2000), the Sixth Circuit held that a reasonable jury could find that a back injury which precluded a product deliveryman from lifting more than 23 pounds significantly restricted him in the major life activity of working. It stated that "[g]iven that the determination of whether a claimant is disabled is made on an individual basis, and that the court may consider the manner in which a claimant's personal education and prior work experience limits his ability to pursue employment in other sectors of the economy, the district court's conclusion that Burns is disabled was reasonable." Id. at 254.

In Webner v. Titan Distribution, Inc., 267 F.3d 828 (8th Cir. 2001), the Eighth Circuit held that a back injury which precluded an assembly-line worker from lifting more than 15 pounds regularly, 25 pounds occasionally, and 50 pounds at any time, and from twisting and bending more than 12 times per hour, significantly restricted him in the major life activity of working. It stated:

> Webner testified at trial that his back injury limited his ability to walk, to stand for long periods of time, to twist, and to bend at the waist without pain, which ultimately

affected his ability to work. The jury also heard testimony from Dr. Nelson, stating that Webner had an impairment rating of 18% of the body as a whole after his three back surgeries, was only authorized to return to work incrementally subject to bending and lifting restrictions, and required physical therapy.

Furthermore, an individual is substantially limited in his ability to work under the ADA if the impairment "significantly restricts" the individual's "ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). At trial, a vocational expert testified on Webner's behalf that because of Webner's back injury, he was precluded from performing work that fell in the heavy and very heavy industrial classifications. These two classifications required the ability to lift in excess of Webner's lifting restriction of 50 pounds. While a lifting restriction standing alone is insufficient to demonstrate that Webner was substantially limited in the life activity of working, the inability to lift heavy objects can translate across a broad spectrum of physically demanding jobs. [Citation omitted.] Viewing all of the evidence which shows how Webner's back injury impacted him in his favor, we conclude that a reasonable jury could have

> determined that Webner's back injury had substantially limited his ability to work, to twist, to bend, and to stand, in addition to limiting his ability to lift. (Id. at 834-35.)

In Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3rd Cir. 1998), the Third Circuit held that a back injury which precluded a meat cutter from lifting objects weighing more than 50 pounds and from carrying objects weighing more than 25 pounds, together with his limited education, training, and skills, substantially limited him in the major life activity of working. It based its holding on a vocational expert's opinion that "the best that could be hoped for . . . him, outside of his [job with the defendant], would be a minimum wage type of position in an unskilled light or medium duty capacity." Id. at 785.

The Fourth Circuit's conclusion that Petitioner cannot prove that she is substantially limited in any major life activity can't be reconciled with Cochrum, Burns, Webner, or Mondzelewski.

But perhaps more significantly, the analytical framework employed by the Fourth Circuit clashes with the process endorsed by this Court and other Circuits for determining whether an individual has a disability.

The Fourth Circuit disregarded this Court's admonition in Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002), that the ADA "requires," and thus certainly ***allows***, those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their ***own experience*** . . . is substantial." Id. at 691-92 (quoting Albertson's, Inc. v.

Kirkingburg, 527 U.S. 555, 567 (1999)(emphasis added)). It is undisputed that Petitioner's own experience was that her back impairment and its limitations rendered her efforts to perform the store-clerk job debilitatingly painful and futile – to the point that Respondent's Operations Manager stated that "it appeared to" him that Petitioner might not be able to increase her tolerance for work and that he was "not optimistic" about Petitioner's recovery prospects. Ignoring this evidence, the Fourth Circuit focused primarily on doctors' notes generated during Petitioner's efforts at rehabililation. App. 7a-10a.

Moreover, the emphasis which the Fourth Circuit placed on those notes conflicts with the Third Circuit's treatment of such notes. The Third Circuit has rejected the notion that such notes should control the determination of whether an individual has a substantially-limiting impairment. In Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3rd Cir. 1999), the Third Circuit stated:

> Another reason that the school district denies that Taylor is disabled is that before the school district allowed Taylor to return to her job, she was required to submit a note from her doctor saying that she was able to work. Dr. Sonnenberg responded to this requirement by sending a one sentence message saying that Taylor "is able to return to work and is not disabled." ... The school district argues that since the doctor said that Taylor was "not disabled," Taylor must have been symptom free.

> But the doctor's remark appears to be simply another way of saying that Taylor was capable of working. It is hardly conclusive proof that Taylor was not substantially limited. Id. at 310-11.

Cf. Bennett v. Unysis Corp., 2000 U.S. Dist. LEXIS 18143, at *28 (E.D. Pa. 2000)(applying Taylor and holding that a doctor's statement that the plaintiff's "condition has improved and she is able to resume her former duties on 12/23/97" was "not sufficient evidence for us to conclude that [plaintiff] required no accommodations").

The Fourth Circuit also strayed from other Circuits' holdings, and from this Court's precedent, by holding (App. 11a) that Petitioner's employment at a car dealership after leaving Respondent employ "reinforces" the conclusion that she is not substantially limited in working. In DePaoli v. Abbott Lab., 140 F.3d 668 (7th Cir. 1998), the Seventh Circuit held that "an employer cannot avoid [ADA] liability by showing that the employee is still generally capable of doing some economically valuable work in the national economy." Id. at 672. In Webb v. Garelick Mfg. Co., 94 F.3d 484 (8th Cir. 1996), the Eighth Circuit rejected the notion that "a plaintiff can never demonstrate disability as long as there is any other job that she can perform." Id. at 487. Cf. Henderson v. Ardco, Inc., 247 F.3d 645, 652-53 (6th Cir. 2001)(holding that supervisor's "acknowledgment that 'right now plaintiff's working at the Piggly-Wiggly, so obviously she can do some things' does not show that [the supervisor] did not perceive [plaintiff's] capacity to work to be substantially limited"). And, as the Sixth Circuit stated in Burns, supra, 222 F.3d 247, 256 (6th Cir. 2000), the converse of this Court's holding, in Sutton v. United Air Lines, Inc.,

527 U.S. 471, 523 (1999), that "[t]o be substantially limited in the major life activity of working ... one must be precluded from more than one type of job, a specialized job, or a particular job of choice," is that an individual's ability to perform some work does not disqualify her from working-disabled status under the ADA. 222 F.3d at 255.

The Fourth Circuit also deviated from other Circuits' precedent by failing to factor Petitioner's education, training, knowledge, and skills into the calculus of whether she is substantially limited in working. It completely ignored the evidence relating to these factors, even though these factors were addressed in the reports of Petitioner's vocational experts. By contrast, other Circuits have stressed the need for consideration of these factors in the working-disabled calculus. See Burns v. Coca Cola Enterprises, 222 F.3d 247, 254 (6th Cir. 2000)(stating "that the determination of whether a claimant is disabled is made on an individual basis, and that the court may consider the manner in which a claimant's personal education and prior work experience limits his ability to pursue employment in other sectors of the economy"); Deppe v. United Airlines, 217 13 F.3d 1262, 1266 (9th Cir. 2000)("An assessment of one's training, knowledge, and skills is important in determining whether the individual is disabled within the meaning of the ADA").

Indeed, the Sixth Circuit in Burns, supra, expressly recognized that the Fourth Circuit's approach to the working-disabled issue conflicts with the ADA and other Circuits' holdings. It noted that the Fourth Circuit in Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346 (4th Cir. 1996), held that "a twenty-five pound lifting restriction could not, as a matter of law, substantially limit

the major life activity of working," 222 F.3d at 255 n. 3, and then criticizing that holding in the following passage:

> [T]he Fourth Circuit's decision on this issue conflicts with the ADA's directives that the determination whether an impairment substantially limits a major life activity must be made on an individual basis, and that the impaired individual's ability to work must be compared not with "an average persons's abilities," ibid., but with the abilities of a person with "comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i); [citation omitted] DePaoli v. Abbott Laboratories, 140 F.3d 668, 672 (7th Cir. 1998)(the determination whether an individual is "disabled" under the ADA is "an individualized one, and must be determined on a case-by-case basis"). It is obvious that a lifting restriction would substantially limit a manual laborer's ability to work to a far greater extent than it would limit that of an accountant, lawyer, or teacher. Id. at n.3.

II. THE FOURTH CIRCUIT'S STANDARDS FOR DETERMINING WHETHER AN INDIVIDUAL IS REGARDED AS DISABLED CONFLICT WITH THE SIXTH'S CIRCUIT'S STANDARDS

The Fourth Circuit held (App. 11a n. 5) that Respondent did not regard Petitioner as disabled, even though physicians and a vocational expert had opined that she could perform the Area Supervisor position with

accommodations, even though Respondent refused to allow Petitioner to return to her Area Supervisor job unless she first proved her ability to work a more-physically-rigorous job, and even though Respondent's Operations Manager stated, after witnessing Petitioner experience intense physical pain that precluded her for performing that more-demanding job, that "it appeared to" him that Petitioner might not be able to increase her tolerance for work and that he was "not optimistic" about Petitioner's anticipated improvement.

In stark contrast, the Sixth Circuit, in Henderson v. Ardco, Inc., 247 F.3d 645 (6th Cir. 2001), the Sixth Circuit held that a reasonable jury could find that an employer regarded as disabled a welder whose back injury precluded him from stooping and lifting more than 25 pounds frequently and 40 pounds infrequently. It stated:

> We have also held that an individual may be disabled by a lifting restriction of 23 pounds, by being substantially impaired in the major life activity of working, if that restriction prevented him from performing "medium to heavy lifting and other forms of manual labor," and those jobs constituted the majority of the jobs for which that plaintiff is suited based on his age, education, and experience. [Citation omitted.] Similarly, Henderson appears to have raised a genuine issue of material fact that Ardco perceived her as unable to perform anything but "light duty" work, and that it perceived that medium to heavy manual labor constituted a majority of the jobs available to her based on her age, education and experience.

> The interpretive guidance provided on "substantial limitation" of working also supports the view that this case is inappropriate for summary disposition. As an illustration, the EEOC indicates that "an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates . . . her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs." 29 C.F.R. § 1630, App. at 353-54 (quoted in Burns, [supra], 222 F.3d at 254); DePaoli v. Abbott Laboratories, 140 F.3d 668, 672 (7th Cir. 1998), 140 F.3d 668, 672 (7th Cir. 1998)(quoting same language). Id. at 652.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,
David W. Skeen
Wright, Constable & Skeen, L.L.P.
100 North Charles Street, 16th Floor
Baltimore, Maryland 21201
(410) 659-1305

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MARY D. POLLARD,
Plaintiff-Appellant,

v.

HIGH'S OF BALTIMORE, INCORPORATED,
Defendant-Appellee.

No. 01-1342

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(CA-99-3455-AMD)

Argued: October 29, 2001

Decided: February 25, 2002

Before WILKINSON, Chief Judge, GREGORY, Circuit Judge, and Malcolm J. HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Gregory and Judge Howard joined.

COUNSEL

ARGUED: Paul Francis Evelius, WRIGHT, CONSTABLE & SKEEN, L.L.P., Baltimore, Maryland, for Appellant. Christopher Mark Feldenzer, LAW OFFICES OF NORMAN R. BUCHSBAUM, Baltimore, Maryland, for Appellee. **ON BRIEF:** Norman R. Buchsbaum, LAW OFFICES OF NORMAN R. BUCHSBAUM, Baltimore, Maryland, for Appellee.

OPINION

WILKINSON, Chief Judge:

Plaintiff Mary Pollard claims that defendant High's of Baltimore, Inc. violated her rights under the Americans with Disabilities Act ("ADA") by failing to accommodate her disability and by constructively discharging her. Pollard also claims that she was wrongfully discharged under Maryland law. The district court granted summary judgment to High's. Because Pollard's impairment during her recovery from back surgery was a temporary one not covered by the ADA, and because High's did not wrongfully discharge her, we affirm the judgment of the district court.

I.

Plaintiff Mary Pollard was an Area Supervisor for defendant High's of Baltimore, Inc., which operates a chain of convenience stores. Pollard began working for High's in 1985 as a store clerk and was eventually promoted to the Area Supervisor position. Area Supervisors are responsible for monitoring ten to fifteen stores. This requires spending considerable time driving from store to store within an assigned area and occasionally filling in for clerks when clerks and/or managers are unable to work. Area Supervisors must be on call twenty-four hours a day in case of emergencies and typically work more than forty hours per week.

In August 1997, Pollard injured her back while working as an Area Supervisor. After a brief absence from work, she returned to her job until December 1997. At that time, Pollard was informed by her personal physician, Dr. Brager, that she would need back surgery. She had that surgery in January 1998 and also filed a claim with the Maryland Workers' Compensation Commission. Because of complications from the surgery, she was not cleared to return to work until April 1998.

In April 1998, Dr. Brager determined that Pollard could work with the following restrictions: Pollard was limited to working eight hour days, was prohibited from doing any repetitive bending or any lifting

of more than five pounds, and was prohibited from driving for extended periods of time. When she informed High's of these conditions, High's told Pollard that it did not have "light-duty" for supervisors and that she could not yet return to work.

During her recovery and attempts to return to work, Pollard continued to deal with High's workers' compensation insurance carrier and rehabilitation specialists retained by the insurer. From May until June 1998, Pollard participated in a "work-hardening" program with a physical therapist and consulted with vocational therapists provided by the insurer. In June 1998, Dr. Rosenthal, who monitored Pollard's progress for the insurer, concluded that Pollard could return to work as an Area Supervisor with restrictions.

On August 25, 1998, Pollard contacted High's directly and informed her District Manager, Patricia Kelly, that she was ready to return to work. Shortly thereafter, a vocational therapist called Pollard to arrange a meeting between himself, Pollard, and Dr. Brager. During this meeting on September 4, 1998, Dr. Brager reduced the work restrictions he had imposed on Pollard in April as follows: Pollard was still prohibited from working more than eight hours a day and from bending repetitively, but the restriction on lifting was changed to no more than twenty-five pounds, and Pollard was now permitted to drive for extended periods.

On September 18, Pollard, the vocational therapist, Kelly, and High's Operation Manager, Timothy Sheehan, met to discuss Pollard's return to work. Everyone at the meeting acknowledges that they discussed the ways in which Dr. Brager's restrictions on heavy lifting and repetitive bending could be implemented. The parties agreed that Pollard could use the assistance of her coworkers and subordinates to handle the more physically demanding tasks she would be required to perform. However, the parties dispute what plan of action regarding Pollard's return to work eventually resulted from this discussion.

Pollard contends that in light of Dr. Brager's eight hour work restriction, Sheehan insisted that High's would not permit her to work as a "part-time" Area Supervisor. Therefore, it was proposed that Pollard begin working as a store clerk. Pollard claims she had no choice but to work first as a store clerk because she was convinced it was

the only way she would be permitted to return to her position as an Area Supervisor. High's, however, contends that Pollard offered to work as a store clerk. According to High's, this arrangement was implemented to allow Pollard to regain her strength until she could resume her duties as an Area Supervisor.

Regardless of whose suggestion it was, Pollard returned to work, as a clerk, on September 23, 1998. She was paid $5.60 an hour, or approximately $12,000 a year, while working as a clerk, compared to the $40,000 a year she earned as an Area Supervisor. There is some confusion about how the issue of Pollard's pay was to be handled since she was receiving workers' compensation income. High's contends that it believed the insurer would continue to pay partial benefits so that Pollard's net income would not be reduced, but High's does not dispute that during the time Pollard worked as a clerk she was not paid this difference. And while Pollard contends that High's should have known she was not being paid the difference, there is no record that Pollard formally complained to any High's official about her compensation.

Despite the modifications in the store clerk position to accommodate her restriction on heavy lifting and repetitive bending, Pollard found the physical demands of working as a clerk unbearable. Pollard experienced such pain that she rarely, if ever, completed any of the eight hour shifts she had been assigned. Yet, on September 29, 1998, when Dr. Brager lifted her eight hour work restriction, Pollard reported this to Sheehan and expected to be returned to her Area Supervisor position. Sheehan, however, insisted that Pollard had to demonstrate that she could work an eight hour day as a store clerk before she could return to her Area Supervisor position. Pollard continued to work as a clerk for approximately one more month before quitting on October 29, 1998. When she quit, Pollard informed High's that she had obtained employment elsewhere. And Pollard did, in fact, obtain immediate reemployment at a car dealership.

On November 12, 1999, Pollard brought this suit, alleging, *inter alia*, that High's violated her rights under the ADA by failing to accommodate her disability and constructively discharging her. Pollard also brought an action under Maryland law claiming wrongful termination. The district court granted summary judgment for High's

on November 21, 2000. The district court held that, as a matter of law, Pollard was "not entitled to disability discrimination protection because she cannot satisfy the ADA definition of a 'qualified individual with a disability.'" The court concluded that there was "no evidence that the physical limitations arising from [Pollard's] back injury were severely limiting." The court also found that her immediate reemployment elsewhere showed she was not "'substantially limited' in her ability to work" and that High's did not regard Pollard as disabled. Finally, the court determined that Pollard's state law claim for wrongful discharge also failed as a matter of law because she had "not proffered evidence to create a factual issue as to whether her working conditions were purposefully made so intolerable that she was forced to quit." Pollard appeals.

II.

A.

We begin by considering Pollard's ADA claim. The ADA prohibits discrimination by a covered entity, including a private employer such as High's, "against a qualified individual with a disability." *See* 42 U.S.C. §§ 12111(2), 12112(a). Therefore, in order to come within the ADA's protected class, a plaintiff must first show that she is disabled within the meaning of the Act. The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Pollard's principal assertion is that she is substantially limited in, *inter alia*, the major life activity of working under § 12102(2)(A). Pollard asserts, and High's does not dispute, that her back injury is a physical impairment and that working is a major life activity.[1] Therefore, whether Pollard is "disabled" turns on whether her back injury is substantially limiting.

[1]The Supreme Court has noted "the conceptual difficulties inherent in the argument that working could be a major life activity," but declined to "decide this difficult question." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681, 692 (2002). This question is likewise not necessary to the resolution of this case.

In order to demonstrate that an impairment is substantially limiting, an individual must show that she is significantly restricted in a major life activity. *See, e.g., Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997); 29 C.F.R. § 1630.2(j)(1). And in determining whether an impairment is substantially limiting, courts may consider the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact" of the impairment. 29 C.F.R. § 1630.2(j)(2).[2] These factors indicate that a temporary impairment, such as recuperation from surgery, will generally not qualify as a disability under the ADA. *See, e.g.*, 29 C.F.R. § 1630.2(j), app. at 353. An impairment simply cannot be a substantial limitation on a major life activity if it is expected to improve in a relatively short period of time.

The Supreme Court's unanimous opinion in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), supports this conclusion. In *Toyota*, the Court stated that the ADA's "substantially limits" requirement indicates that an impairment must interfere with a major life activity "'considerabl[y]' or 'to a large degree.'" 122 S. Ct. at 691. And the Court stressed that an "impairment's impact must also be permanent or long-term." *Id.* The Court's earlier opinion in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), further suggests that temporary impairments will typically not allow an individual to claim relief under the ADA. In *Sutton*, the Court held that corrective measures must be taken into account when evaluating an individual's impairment. 527 U.S. at 482, 488-89. If an individual's ability to correct an impairment must be considered, it seems clear that the individual's likelihood of recovery from a temporary impairment must also be considered.

Prior precedent of this court likewise indicates that temporary impairments usually do not fall within the ADA's definition of "dis-

[2]The persuasive authority of the Equal Employment Opportunity Commission ("EEOC") regulations interpreting the ADA is unclear, and the issue has explicitly been left open by the Supreme Court. *See, e.g., Toyota*, 122 S. Ct. at 689-90; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480 (1999). However, because both parties accept the EEOC regulations, and determining their validity is not necessary to decide this case, we have no occasion to determine what level of deference they are due.

ability." In *Halperin*, we stressed that "it is evident that the term 'disability' does not include temporary medical conditions, even if those conditions require extended leaves of absence from work." 128 F.3d at 199 (internal citations omitted). And several of our sister circuits have taken a similar approach with respect to temporary impairments under the Act. *See, e.g.*, *Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir. 1998) (holding that plaintiff's inability to work while recovering from wrist and elbow surgery did not qualify as a disability under the ADA and noting that "the ADA requires permanent or long-term impairments"); *Heintzelman v. Runyon*, 120 F.3d 143, 144-45 (8th Cir. 1997) (same with regard to a temporary back injury); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (same with regard to recovery from ankle injury and surgery); *McDonald v. Pennsylvania*, 62 F.3d 92, 95-96 (3d Cir. 1995) (same with regard to recuperation from abdominal surgery); *Evans v. City of Dallas*, 861 F.2d 846, 852-53 (5th Cir. 1988) (same under the Rehabilitation Act of 1973 with respect to inability to work due to knee surgery).

However, while the presumption exists that temporary impairments do not qualify as disabilities under the ADA, temporary conditions still require a case-by-case evaluation under the Act. *See, e.g.*, *Toyota*, 122 S. Ct. at 692; *Sutton*, 527 U.S. at 483; *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995). Temporary disabilities present a spectrum of cases and at some point the duration of an impairment could be so long that it cannot properly be characterized as temporary. We must therefore examine how severe Pollard's particular impairment was, how long her impairment was expected to last, and how likely it was that her impairment would be ameliorated over time.

B.

The undisputed evidence in this case demonstrates that Pollard suffered a back injury in August 1997, eventually had to undergo surgery in January 1998, and, due to an infection, had to take a leave of absence from work until September 1998. However, this nine-month absence is insufficient to demonstrate that Pollard had a permanent or long-term impairment that significantly restricted a major life activity. First, nothing in the nature or severity of Pollard's impairment indicated that she had anything other than a temporary impairment.

Recovering from surgery can frequently take several months. And this is especially likely when there are complications, such as an infection. But physical impairments while recuperating from surgery are not evidence of a permanent disability. *See, e.g.*, *Gutridge*, 153 F.3d at 901-02. Therefore, nothing in the nature of Pollard's condition during the time she worked for High's suggested that she had a permanent impairment or that she was not likely to make a full recovery.

Second, there is no evidence that Pollard's impairment was expected to be permanent or long-term during the relevant time period in 1998. In fact, communications to High's from Pollard and her personal physician, Dr. Brager, indicated that her condition was thought to be only temporary and that Pollard would soon be able to resume her full duties as an Area Supervisor. Doctors' evaluations, which indicate that an individual's impairment is improving, are persuasive evidence that the impairment is expected to be only temporary. *See, e.g.*, *Mellon v. Fed. Express Corp.*, 239 F.3d 954, 956-57 (8th Cir. 2001); *Heintzelman*, 120 F.3d at 145.

Dr. Brager's contemporaneous treatment notes and his orders based on these notes explained that Pollard was expected to make a full recovery. Brager's notes documented Pollard's improvement and progressively removed her work restrictions. For example, Dr. Brager's August 18, 1998 note stated that "overall [Pollard] is doing reasonably well." Brager went on to explain:

> I feel that there is a good chance that after an initial "break in" that she will be able to get back to the kind of work that she had done in the past. However, it is not reasonable for us to expect that she will be able to jump right back in to fourteen hour days and lifting heavy items on a repetitive basis. It is my recommendation that the patient go back to work at no more than eight hours per day with no lifting greater than 15 to 20 pounds and no repetitive bending.

Two weeks later, on September 4, 1998, Brager wrote another note, indicating that Pollard was improving and removing some of his prior restrictions on her activities. He wrote:

> Patient is doing quite well with normal activities of daily living. She is spending more time in and out of her car.

> Overall, I think there is no question that she is now ready to go back to work at eight hours per day, and I think that we can even increase her lifting limit to 25 pounds. I still do not want her to do repetitive bending.

Brager also stated that he would see Pollard again in several weeks to reevaluate her "for further return to normal duties at work."

On September 29, 1998, several days after Pollard's return to work as a store clerk, Brager wrote a third progress note again explaining that Pollard continued to improve. Brager wrote that she had a "normal gait with good mobility throughout." And he removed Pollard's eight hour work restriction, stating, "I feel at this time [Pollard] is ready to return to her regular work, unlimited hours, with the only restriction being that she not lift more than 25 pounds or that she not bend on a repetitive basis."

In addition to the information Brager provided to High's, Dr. Rosenthal, who monitored Pollard's condition for the workers' compensation insurer, also reported Pollard's progressive improvement over time. Rosenthal rendered an early opinion in February 1998, shortly after Pollard's surgery, indicating that he had doubts about her ability to return to work. However, Rosenthal modified his opinion as he followed Pollard's recovery. On June 26, 1998, after examining Pollard, he stated that "Pollard is doing quite well." He explained: "I believe that she can return to work as an area supervisor at the present time; however, she will have some slight restrictions." Rosenthal concluded by stating, "I believe that with time her symptoms will continue to improve and it is likely that in several months she may improve enough to actually return to full duty at work." On July 22, 1998, after watching a videotape of Pollard doing various activities, Rosenthal reaffirmed his conclusion that Pollard was improving.

Additionally, Pollard repeatedly communicated to High's that she was ready and able to return to full-time duty as an Area Supervisor. And Pollard has admitted that, during her employment with High's, neither she nor any of her treating physicians or attorneys ever communicated to any High's official that her physical impairment was permanent. As the district court correctly noted, they could not have

done so because there was no medical evidence at that time to support a conclusion that Pollard's condition was long-term or permanent.[3]

Pollard contends that nothing in her doctors' reports specifically stated that her impairment was temporary, and that Brager never lifted all of her work restrictions, indicating that she had a permanent or long-term impairment. We are unpersuaded. In the end, Pollard was left with only the restrictions that she not lift more than twenty-five pounds or bend repetitively. These mild limitations are not significantly restricting. And we have consistently held that similar restrictions are not evidence of a permanent impairment that substantially limits any major life activity under the ADA. *See, e.g.*, *Halperin*, 128 F.3d at 200; *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996).

Pollard also seems to claim that because High's observed that she could not perform the modified duties of a store clerk for eight hours, High's should have recognized that she had a permanent impairment, or at a minimum, an impairment of an indefinite duration. However, in the same breath, Pollard argues that High's should have allowed her to return to her position as an Area Supervisor. This indicates that she felt capable of performing an Area Supervisor's duties, which indisputably include filling in for store clerks. All that Pollard's inability to complete her shift as a store clerk indicated was that, consistent with both the contemporaneous medical reports and Pollard's

[3]However, on July 14, 2000, Dr. Brager changed his original opinion and determined that Pollard was permanently disabled and had been since January 1998. Contrary to Pollard's assertion, Dr. Brager's revised opinion and the opinions of her hired vocational experts, based on that 2000 report, do not affect our analysis under the ADA because "the date of an adverse employment decision is the relevant date for determining whether a plaintiff is a 'qualified individual with a disability.'" *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373, 379 (4th Cir. 2000); *see also Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998). And as the district court noted, there does not appear to be any "authority in the case law interpreting the ADA to allow a medical practitioner's *nunc pro tunc* opinion to contradict his own contemporaneous opinion concerning a patient's disability in order to shore up a discrimination claim."

own statements, Pollard needed a longer break-in period. It did not indicate that her impairment was permanent.[4]

Furthermore, Pollard immediately took a job with a car dealership when she left High's. This reinforces our conclusion that Pollard was not substantially limited in the major life activity of working. In order to be substantially limited in the major life activity of working, "one must be precluded from more than one type of job, a specialized job, or a particular job of choice." *Sutton*, 527 U.S. at 491-92. An individual must demonstrate that she is unable to work in a broad range of jobs. *Id.*; *see also* 29 C.F.R. § 1630.2(j)(3)(i). And obtaining a new job is evidence that an impairment is not substantially limiting. *See, e.g.*, *Halperin*, 128 F.3d at 200; *Heintzelman*, 120 F.3d at 145. As the district court noted, Pollard's immediate reemployment elsewhere belies the assertion that she was "disabled" within the ADA's definition or that her impairment was anything other than temporary during the time of her employment at High's.[5]

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[4]Pollard claims that she has produced evidence indicating that High's knew that she was permanently disabled in 1998. However, this evidence consists solely of a single handwritten note by Pollard's vocational therapist regarding a conversation he had with Sheehan about Pollard's performance as a store clerk. In that conversation, Sheehan allegedly said that he was "not optimistic" about Pollard's improvement. This isolated statement is insufficient to contradict the overwhelming evidence from Pollard's doctors and Pollard herself that her condition was improving and was only temporary.

[5]Pollard also claims that High's regarded her as having an impairment that substantially limited her in the major life activity of working. *See* 42 U.S.C. § 12102(2)(C). In order to demonstrate that High's regarded her as disabled, Pollard must show that High's entertained a misperception about her condition. She must show that High's mistakenly believed her to have either a substantially limiting impairment that she did not have, or a substantially limiting impairment when, in fact, her impairment was nonlimiting. *Sutton*, 527 U.S. at 489; *see also Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 703 (4th Cir. 2001). Pollard has failed to present evidence to indicate that High's regarded her as disabled. High's would not allow Pollard to resume her Area Supervisor position until she demonstrated that she could work eight hours or more. But, as previously discussed, this was not done based on a faulty perception that she would never return to that position. As the district court noted, the evidence indicates that High's believed Pollard's "work limitations were temporary and that she would eventually, if not soon, return to her former duties."

Of course, an impairment that is not substantially limiting under the ADA definition of "disability" can still be a source of understandable concern for the individual affected. We do not make light of Pollard's surgery or the period of recuperation that followed it. However, applying the protections of the ADA to temporary impairments, such as Pollard's, would dramatically expand the scope of the Act. *See, e.g., Halperin*, 128 F.3d at 200. Congressional findings, enacted as part of the ADA, require the conclusion that Congress did not intend for the Act's protections to extend to individuals with temporary impairments. Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1). If Congress had intended temporary disabilities to be covered by the Act, this number undoubtedly would have been much higher. *Cf. Toyota*, 122 S.Ct. at 691 (drawing same conclusion with respect to extending the ADA to individuals with impairments that preclude the performance of "some isolated, unimportant, or particularly difficult manual task"); *Sutton*, 527 U.S. at 484-87 (drawing same conclusion with respect to extending the ADA to individuals with correctable physical limitations). Federal courts are simply not in the position to extend the ADA without a directive from Congress, and we decline to do so in this case.

III.

We next turn to Pollard's state law claim that she was wrongfully terminated in retaliation for filing a workers' compensation claim.[6] *See Adler v. Am. Standard Corp.*, 432 A.2d 464, 473 (Md. 1981); Md. Code Ann. Lab. & Empl. § 9-1105. In order to establish this claim, Pollard must show that she was discharged in the first place. Ordinarily, an employee who resigns would not have a right of action for abusive discharge. *Beye v. Bureau of Nat'l Affairs*, 477 A.2d 1197, 1201 (Md. Ct. Spec. App. 1984). However, it is sometimes necessary "to discard form for substance" and the law therefore recognizes the concept of "constructive discharge." *Id.* Under Maryland law, the standard for measuring whether a resignation is actually a constructive discharge is "whether the employer has deliberately caused or allowed

[6]Pollard also makes a claim for constructive discharge under the ADA, but because we determined that Pollard was not disabled within the meaning of the Act, we need not review this claim.

the employee's working conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign." *Id.* at 1203. By using strong words such as "deliberately," "intolerable," and "compelled," Maryland courts, like those in most states, have set a high standard for constructive discharge claims.

Pollard cannot meet this high threshold. And High's simply cannot be said to have rendered Pollard's working conditions intolerable. High's honored Pollard's request to return to work. And it was hardly remiss of an employer to ease an employee's return to the workplace after that employee had undergone back surgery. It is undisputed that the Area Supervisor position Pollard wanted involved long hours, often in excess of forty hours per week, extensive driving between stores, and supervisory pressure in addition to physical labor and occasionally filling in as a clerk. Pollard admits that she rarely, if ever, was able to work more than five or six hours in a modified store clerk position, so High's was justified in its conclusion that she was not yet ready to return to her Area Supervisor position and that she needed a longer break-in period. If providing such a temporary break-in period were impermissible, the law would be creating perverse incentives for employers to force recuperating employees into positions prematurely, leading potentially to additional liability for the employer and, most unfortunately, to considerable pain and relapses for the employee.

Moreover, the conditions under which Pollard returned were hardly intolerable. To the contrary, as the district court noted:

> [Pollard] acknowledges that each time she informed Sheehan of her need to depart early for the day because of discomfort caused by her back, he never imposed upon her any condition that she remain at work or suffer adverse consequences. She does not assert she was denied the assistance of her co-workers to implement the lifting and bending restrictions imposed by Dr. Brager.

Pollard's reduction in salary when she returned to work as a store clerk does not reveal a deliberate attempt by High's to make Pollard's working conditions intolerable. While there is some dispute about how her pay was going to be handled during this interim period, there

is no dispute that High's believed its workers' compensation insurance carrier was going to pay Pollard the difference between her store clerk and Area Supervisor salaries. And although Pollard alleges that High's should have known that there were problems relating to her pay, there is no record that Pollard made a formal complaint about not receiving the workers' compensation benefits. Instead, Pollard quit and took a position with a car dealership.

In allowing Pollard to return to work initially as a clerk for a limited period each day, High's actions paralleled, in substance, the recommendations of Pollard's doctors that she return to work with restrictions that would be modified over time. The law does not require a company to insist that an employee perform immediately at pre-surgery levels. The hazards of such a course are obvious, and High's acted responsibly in not subjecting Pollard to them.[7]

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

[7]Even if Pollard could proffer enough evidence to show a constructive discharge, she fails to show a causal nexus between her alleged constructive discharge and the filing of her workers' compensation claim as required by *Adler*. Pollard claims that Sheehan twice made negative comments about the fact that she had hired a disability lawyer and that these comments are enough to evidence retaliatory animus. However, Sheehan's two brief, off-hand comments about Pollard's particular attorney made seven months apart do not evidence retaliatory animus for filing a workers' compensation claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY D. POLLARD,	*	
Plaintiff,	*	Civil Action No.: AMD 99 CV 3455
v.	*	
HIGH'S OF BALTIMORE, INC.,	*	
Defendant.	*	

* * * * * * * * *

MEMORANDUM

Plaintiff, Mary Pollard, has brought this action against her former employer, High's of Baltimore, Inc., under the American with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, alleging that High's discriminated against her by failing to accommodate a disability, demoting her and constructively discharging her. Pollard also alleges a wrongful discharge claim under state law.[1] Now pending in High's motion for summary judgment. The issues have been fully briefed and no hearing is necessary. For the reasons set forth below, I shall grant High's motion for summary judgment.

I

[1] Pollard relies on the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), in respect to her state law claim, but it appears that jurisdiction may exist on the basis of diversity of citizenship.

Pursuant to Fed. R. Civ. P. 56(c) summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248. Summary judgment is also appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. "When a motion for summary judgment is made and supported as provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp.*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252; *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). Of course, the facts, as well as the justifiable inferences to be drawn therefrom, must be viewed in the light most favorable to nonmoving party. *See Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The court, however, has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

II

Viewing the evidence in the light most favorable to Pollard, the material facts are as follows. High's operates a

chain of approximately 100 convenience stores. The chain is managed by the Operations Manager, Timothy Sheehan. The chain is divided into two districts of approximately fifty stores, each managed by a District Manager who supervises the work of several Area Supervisors. Each Area Supervisor is responsible for ten to 15 stores. Each store is staffed by a Store Manager or Assistant Manager and a Store Clerk.

The responsibilities of an Area Supervisor are varied. Generally speaking, an Area Supervisor monitors and assures the compliance of the stores within her area of responsibility with all aspects of store operation. This requires considerable amounts of time driving between the stores in the assigned area. Though the parties dispute the frequency with which an Area Supervisor is called upon to do so, they agree that that an Area Supervisor is required from time to time to work the shifts of Store Clerks and/or Managers who are unable to work. Accordingly, an Area supervisor must be able to perform the duties (including the physical tasks) of Sales Clerks, Assistant Managers and Managers, but again, the quantum and frequency of physical exertion required of an Area Supervisor are hotly disputed by the parties. The parties agree that an Area Supervisor is required to be on call 24 hours a day in case of emergencies or alarm calls. The parties also agree that an Area Supervisor typically works an average of greater than 40 hours per week, and often as many as 60 hours per week.

Upon her graduation from high school in 1985, Pollard began working for High's as a Store Clerk. She was eventually promoted to an Area Supervisor under District Manager Patricia Kelley's direct supervision. Pollard was on duty as an Area Supervisor when she injured her back in late August 1997. She stopped working for approximately two

weeks, returned to work and continued to work (in considerable pain) until early December 1997. After consulting with her personal physician, Dr. Myles Brager, Pollard informed Sheehan and Kelley that she was scheduled to undergo surgery to correct the painful disc problem in her back.

Pollard underwent surgery in January 1998. In the same month she filed a claim with the Maryland Workers' Compensation Commission with the assistance of retained counsel. Pollard's recovery from back surgery was substantially slowed by complications caused by a serious infection to the wound.

In April 1998, Pollard was cleared to return to work by Dr. Brager with the following conditions: that she be limited to eight hour work days; that she be prohibited from doing any repetitive lifting or any lifting of more than five pounds; and that she be prohibited from driving from extended periods of time. After receiving notice of these conditions, High's told Pollard that it did not have "light-duty" for supervisors and that Pollard could not yet return to work.[2]

Throughout May 1998 and June 1998, Pollard participated in a "work-hardening" program with a physical

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[2] During her period of convalescence and in connection with her attempts to return to work. Pollard was dealing with High's workers' compensation insurance carrier and rehabilitation specialists retained by that insurer. Except as to Pollard's allegations regarding the carrier's reduction in her benefits checks once she returned to work, *see infra* note 5, High's has not challenged Pollard's attribution to it of the actions of the insurance carrier or its subcontractors.

therapist and she also consulted with vocational therapists. The workers' compensation insurer provided all of these services. In June 1998, Dr. Mark Rosenthal, who monitored Pollard's progress for the workers' compensation insurer concluded that Pollard could return to work as an Area Supervisor with restrictions. He informed Pollard that High's should be contacting her to make arrangements, but after several weeks High's had not contacted Pollard.[3]

Pollard finally contacted High's directly on August 25, 1998. In her conversation with Kelly, her District Manager, Pollard made it clear that she was ready to return to work. Kelly responded that she would look into the matter and would get back to Pollard. Soon thereafter, a vocational therapist contacted Pollard and arranged a meeting between himself, Pollard and Pollard's treating physician, Dr. Brager. At that meeting, which occurred on September 4, 1998, Dr. Brager adjusted slightly the conditions he had established in April for Pollard's return to

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[3] Pollard grew frustrated with the lack of contact from High's. She interprets High's inaction during July and August 1998, together with certain statements by the vocational therapist indicating that he was looking for a new job for her, certain statements by Sheehan expressing surprise that she had retained counsel to represent her in connection with her workers' compensation claim and High's insistence that she perform adequately as a Store Clerk for full eight hour shifts as a condition of her resumption of supervisor duties, as probative of High's intent to discriminate against her. I need not determine whether the inference of intentional discrimination proposed by Pollard on the basis of these facts would be sufficient to support a *prima facie* case inasmuch as I have concluded, as discussed in the text, that at the time of these events Pollard was not entitled to protection under the ADA.

work: Pollard was still prohibited from working more than eight hours a day and she was still prohibited from repetitive lifting, but the restriction on lifting was changed from no more than five pounds to no more than 25 pounds. Apparently, Dr. Brager also authorized Pollard to drive for extended periods of time.

On September 18, 1998, Pollard, the therapist, Kelly and Sheehan met to discuss Pollard's return to work as authorized by Dr. Brager. All present appear to acknowledge that they discussed the possible means of implementing Dr. Brager's restrictions against heavy lifting and repetitive bending. It was agreed that Pollard could use the assistance of her coworkers and/or subordinates to handle the more physically demanding tasks she would be required to perform.

The present dispute can be traced most directly to the parties' divergent versions of the plan of action which resulted from the meeting of September 18, 1998. High's contends that at this meeting Pollard offered and Sheehan agreed to implement Dr. Brager's restrictions by permitting Pollard to recommence work as a Store Clerk in High's Hereford, Maryland store. Specifically, High's contends the parties agreed that this arrangement would allow Pollard to regain her strength (while performing the duties of a Store Clerk) until she could resume her position (performing all relevant duties) as an Area Supervisor.

Pollard has a different recollection of the meeting. She asserts that in light of Dr. Brager's eight hour restriction, Sheehan was insistent that High's would not permit her to work "part-time" as an Area Supervisor. Accordingly, Pollard contends, it was Sheehan who proposed that Pollard

begin working as a Store Clerk to permit her to build up her strength instead of allowing her to resume immediately her duties as an Area Supervisor notwithstanding her eight hour restriction.[4] Pollard contends, finally, that she had no choice but to accede to Sheehan's proposal that she resume work as a Store Clerk, as she had become convinced during the meeting that compliance with Sheehan's proposals was the only way she would be permitted to return to her position as an Area Supervisor (if indeed she had any chance of returning to that position).

Pollard returned to work on September 23, 1998, as a Store Clerk. She was paid $5.60 per hour, or approximately $12,000 per year, rather than the approximately $40,000 per year she had previously earned as an Area Supervisor.[5]

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[4] Sheehan, apparently believing that Pollard was still under Dr. Brager's restrictions to refrain from driving for extended periods of time, also proposed that Pollard work in High's Hereford, Maryland store, which was the closest High's store to Pollard's Hanover, Pennsylvania home. Pollard contends that she never told Sheehan that she was still prohibited from driving for long periods of time or that driving caused her discomfort. She does not indicate that she corrected Sheehan's apparent misapprehension.

[5] The parties vigorously dispute the issue of how Pollard's pay was to be handled in view of the workers' compensation income she was receiving; High's contends that it believed that the workers' compensation insurer would continue to pay partial benefits so that her net income would not be reduced when she returned to work. Indisputably, neither High's nor its insurer paid the difference between Pollard's earnings as a clerk and her customary earnings as an Area Supervisor during the few weeks she worked at reduced pay.

Pollard's theory of the case is that she was effectively "demoted" and that the circumstances of the "demotion" rise to the level of a constructive discharge, apparently under both the ADA and state law.

In any event, it is undisputed in the summary judgment record that despite the prohibitions against heavy lifting or repetitive bending, the physical demands of working as a Store Clerk caused Pollard such pain that she rarely if ever completed any of the eight hour shifts to which she was assigned. Pollard seeks to bolster her claim of

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According to Sheehan's uncontroverted deposition testimony, he spoke to the workers' compensation insurer and "they said to me that they were going to not pay her for the amount of hours that she worked times her hourly rate." In other words, apparently, he believed the salary Pollard earned as a Store Clerk would be deducted from her weekly workers' compensation benefit. In this way she would experience no reduction in her net workers compensation income during her "break-in period" after her surgery. Apparently, two weeks after Pollard commenced working as a Store Clerk, Sheehan learned additional information that may have caused him to doubt his assumptions.

Pollard never complained to Sheehan about her compensation as a Store Clerk or about the reduction in her workers' compensation check. She does not allege that she complained to any High's official about compensation. Moreover, on October 22, 1998, Pollard's workers' compensation attorney raised several issues with High's attorney about Pollard's work conditions, but her compensation was not one of the problems mentioned. In any event, Pollard quit (barely six weeks after returning to work) before the issue of her compensation was properly raised and any efforts to resolve that issue had been undertaken.

discrimination by arguing that Sheehan purposefully insisted that she work as a clerk (and complete the tasks requiring constant standing and occasional bending those duties entailed) even though, she contends, she could have performed all of the (less physically demanding) duties of an Area Supervisor by working a seven-day-per-week, eight-hour-per-day schedule.

Approximately a week after Pollard returned to work, on September 29, 1998, Dr. Brager lifted the eight hour restriction. Pollard reported this information to Sheehan, expecting he would permit her to return to her position as an Area Supervisor. To Pollard's surprise, however, Sheehan demurred, insisting that Pollard must demonstrate her ability to work an eight hour day as a Store Clerk before she could return to her position as an Area Supervisor.

All told, Pollard worked as a Store Clerk for approximately six weeks. She stopped working for High's on October 29, 1998. She informed her Store Manager that she had obtained employment elsewhere and quit. Pollard's mother, a Store Manager at another High's store, told High's that Pollard had taken a job with a car dealership in Hanover, Pennsylvania.

III

Even accepting Pollard's factual contentions as true, as a matter of law, she is not entitled to disability discrimination protection because she cannot satisfy the ADA definition of a "qualified individual with a disability." Under the ADA, a qualified individual with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual

holds or desires." 42 U.S.C. §12111(8). "Disability" is defined as "(1) A physical or mental impairment that substantially limits one or more of the major life activities...(2) A record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g).

"Working" is a "major life activity." 29 C.F.R. § 1630.2(i). The ADA regulations define "substantial limits" as

> (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Three factors must be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

Generally, a temporary impairment, such as a broken limb or a period of months recuperating from surgery, does not qualify as a disability. *See, e.g., Gutridge v. Clure*, 153 F.3d 898, 901-902 (8th Cir. 1998) (plaintiff with carpal tunnel syndrome necessitating five separate surgeries and recuperation periods when unable to work not disabled), *cert. denied sub nom. Gutridge v. Midland Computer, Inc.*, 526 U.S. 1113 (1999); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997) (back injury which temporarily kept plaintiff out of work, but from which her doctor expected near full recovery, did not qualify as disability); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (temporary disability recovering from ankle injury and surgery not a "disability" under ADA); *McDonald v. Pennsylvania Dept. of Public Welfare*, 62 F.3d 92, 96 (3rd Cir. 1995) (plaintiff's inability to work for two months while recuperating from abdominal surgery did not make her disabled); *Evans v. City of Dallas*, 861 F.2d 846, 852 (5th Cir. 1988) (inability to work due to knee surgery did not qualify as handicap under Rehabilitation Act of 1973).

Application of the rule of these cases and a dispassionate assessment of the "nature and severity" of her impairment, the "duration or expected duration of the impairment" and the "expected ... long term impact of" her

impairment, compel the conclusion that Pollard was not "disabled" under the ADA. The undisputed record here shows that during Pollard's employment with High's she suffered a serious back injury which, together with a serious infection following surgery, required her to remain out of work for at least six months. However, there is no evidence that the physical limitations arising from her back injury were severely limiting or that at the relevant time they were understood to be or expected to be permanent. To the contrary, the communications to High's from Pollard and her treating physician indicated that her disability was temporary and that she would be able to resume her full duties as Area Supervisor in the not distant future. For example, Dr. Brager's August 18, 1998 notes explain:

> I feel that there is a good chance that after an initial "break in" that she will be able to get back to the kind of work that she had done in the past. However, it is not reasonable for us to expect that she will be able to jump right back in to fourteen hour days and lifting heavy items on a repetitive basis. It is my recommendation that the patient go back to work at no more than eight hours per day with no lifting greater than 15 to 20 pounds and no repetitive bending.

High's Reply, Ex. 3 (Myles D. Brager, M.D. Progress Note, August 18, 1998). Two weeks later Dr. Brager wrote:

> Patient is doing quite well with normal activities of daily living. She is spending more time in and out of her car. Overall, I think there is no question that she is now ready to go back to work eight hours per day, and I think we can even increase her lifting limit to 25 pounds. I still do not want her to do repetitive bending. We will do this for several weeks. I will see her in one month and re-evaluate her at that time for future return to normal duties at work.

High's Reply, Ex. 4 (Myles D. Brager, M.D. Progress Note, September 4, 1998). On September 23, 1998, Pollard went back to work as a Store Clerk in the High's store in Hereford, Maryland. On September 29, 1998, Dr. Brager wrote that Pollard's physical examination continued to improve and that she "reveal[ed] normal gait with good mobility throughout." He removed the eight hour work restriction and allowed her to work "unlimited hours." He maintained the 15 pound lifting restriction and the prohibition on repetitive bending. High's Reply, Ex. 5 (Myles D. Brager, M.D. Progress Note, September 29, 1998).

While there is evidence that the medical practitioner retained by the workers' compensation insurance carrier rendered an early opinion which refutes that of Dr. Brager, it is arguably itself internally contradictory[6] and that physician clearly modifies his opinion as he follows Pollard's recovery from surgery. In June 1998, for example, after he examined Pollard, he concluded:

> I believe that she can return to work as an area supervisor at the present time; however, she will have some slight restrictions [as detailed in Dr. Brager's note]....I believe that with time her symptoms will continue to improve and it is likely that in several months she may improve enough to actually return to full duty work.

Pollard Resp., Ex. 4 (Dr. Mark Rosenthal, Orthopaedic Note, June 26, 1998). In July 1998, after viewing a videotape of Pollard doing various activities, Dr. Rosenthal reaffirmed his June conclusions. Thus, by the time Pollard returned to work in September 1998, Dr. Rosenthal was expressing the opinion that Pollard's physical condition would soon improve to the degree that she could return to full duty work without restrictions. Indeed, Pollard effectively admitted that during her employment with High's she never communicated to High's that her injury or impairment was

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[6] *See* Pollard Resp. Ex. 4 (Dr. Mark Rosenthal, Orthopaedic Note, February 9, 1998).

permanent. High's Reply p.3 n.3 (citing Defendant's Request to Admission No. 5).

To overcome this evidence of the *then* transitory (even if serious) nature of her impairment, Pollard seeks to rely upon a *July 14, 2000*, opinion of Dr. Brager that she is "permanently disabled and had been since at least January 1998."[7] As indicated above, however, this "retrospective" opinion is contradicted by Dr. Brager's own contemporaneous notes concerning Pollard's *then current and expected future capabilities* at the time she was working at High's. Moreover, the record shows that she left her job with High's to work at a car dealership on or about October 29, 1998. Thus, during the relevant time period while she was employed by High's, as far as anyone knew or expected, she suffered from only a temporary impairment requiring mild limitations on her work activities and thus, she did not qualify as disabled under the ADA.[8]

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[7] Dr. Brager's July 2000 opinion was: "[P]laintiff is on a permanent basis, significantly restricted, as compared to the average person in each of the activities of standing, lifting, bending, stooping, squatting, kneeling and remaining in one position; that, on a permanent basis, plaintiff should engage in no prolonged standing or sitting, no lifting of more than 20 pounds on an occasional basis, no repetitive bending, stooping, squatting, or kneeling; and that further surgery will not benefit plaintiff." I am aware of no authority in the case law interpreting the ADA to allow a medical practitioner's *nunc pro tunc* opinion to contradict his own contemporaneous opinion concerning a patient's disability in order to shore up a discrimination claim.

[8] It is clear, as well, that Pollard did not have "a record of such an impairment," 29 C.F.R. § 1630.2(g)(2), since the medical records quoted above indicate that her physical

Even if I were to disregard this record, however, and conclude that Pollard had generated a dispute of material fact as to whether the "nature and severity," the "duration or expected duration," and the "expected ... long term impact of her impairment entitled Pollard to ADA protection as of fall 1998, she would still not qualify as disabled under the ADA because her immediate reemployment elsewhere shows she was not "substantially limited" in her ability to work. The ADA regulations provide:

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impairment was expected to be temporary and that her physician was permitting increasingly more strenuous activity. A contrary interpretation would permit any person who undergoes surgery to claim the protection of the ADA. Likewise, there is no evidence to create a factual dispute that High's "regarded [Pollard] as having such an impairment." 29 C.F.R. § 1630.2(g)(3). High's was not willing to let Pollard resume her Area Supervisor position until she had demonstrated that she could work eight hours or more, but there is no evidence to indicate that High's management did not believe that her work limitations were temporary and that she would eventually, if not soon, return to her former duties. Pollard's unhappiness with the pace of her return to full duties as an Area Supervisor is not probative of her ADA claim on the theory that she was "regarded as" disabled under ADA. In this regard, the parties' dispute over whether the Store Clerk position or the Area Supervisor position was the more physically demanding is not material to the issue of whether Pollard was "disabled" within the contemplation of the ADA in fall 1998. Federal anti-discrimination statutes simply do not impose a requirement on employers that they act wisely or even rationally, but only that they not act discriminatorily. *Ct. Harvey v. Anheuser Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994) ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions").

> The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(I). The regulations also allow consideration of the following factors in determining whether an individual is substantially limited in the major life activity of "working":

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment...
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or

> abilities, within that geographical area, from which the individual is also disqualified because of the impairment....

29 C.F.R. § 1630.2(j)(3)(ii).

These indicia fatally undermine Pollard's claim that she was "substantially limited." The fact that Pollard left her job at High's and immediately began to work at a car dealership in Hanover, Pennsylvania belies the assertion that she was "disabled" as defined by the ADA during the time of her employment with High's. The uncontested fact indicates that Pollard had access to a geographical area which included Hanover (indeed she lived there), and that there were jobs there that she was qualified for and physically able to perform.[9]

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[9] While Pollard was working at High's during the period following her surgery, she was unable to work long hours, and usually could not even complete a full eight hour shift, even after her doctor had removed any limitation on the number of hours she could work. Pollard argues that prior to her injury she was able to minimize the occasions on which she was required to cover for absentee Store Clerks or Store Managers under her supervision through the development of good relationships with her subordinates and proper planning. She does not contend however, that she thus eliminated the requirement. Moreover, while her method may have mitigated her need to work as a Store Clerk or Manager in the past, it does not in any way serve to remove from the Area Supervisor job qualification that she be able to, if necessary, work as a Store Clerk or Manager when no replacement is available. Given that Pollard was out of work for nine months, and given the high turnover of High's employees, it is likely that Pollard would require some time to once again establish the requisite relationships with new

Thus, even though it was not required to do so under the ADA, the record shows that High's was willing to "accommodate" Pollard during her period of impairment by allowing her to work as a Store Clerk with reduced duties (no heavy lifting or repetitive bending) and flexible hours. Pollard does not deny that she did not communicate her dissatisfaction with the accommodations to High's officials.[10] Moreover, she clearly did not allow herself sufficient time in the Store Clerk position to work her way back to an Area supervisor position; that is, she failed repeatedly to complete a full eight hour shift. Instead, after six weeks as a Store Clerk, she unilaterally terminated her employment with High's and went to work elsewhere.

For the reasons, I conclude as a matter of law that during the fall of 1998 Pollard was not a "qualified individual with a disability" under 42 U.S.C. § 12111(8). Accordingly, she was not entitled to ADA protection during her employment with High's and I shall grant summary judgment to High's on the ADA claim.

IV

Pollard's state law claim likewise fails as a matter of law. Pollard alleges that she was discharged in retaliation for filing a workers' compensation claim. Such a discharge

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employees to reduce her need to cover for them as required by the job description.

[10] The one exception is that Pollard raised some of the issues she has raised in this lawsuit via a letter from her attorney to High's attorney on October 22, 1998. However, she quit on October 29, 1998, and therefore never determined what efforts High's might make to redress her concerns.

would violate a clear mandate of public policy, Md. Code Ann. Lab. & Empl. § 9-1105, and would constitute an abusive discharge under Maryland law. *Ewing v. Koppers Co.*, 312 Md. 45, 49, 537 A.2d 1173, 1175 (1988). However, Pollard has not proffered evidence generating a factual issue that she was *discharged*. Rather, by her own admission, she quit. Even if Maryland recognized cause of action for constructive abusive discharge,[11] and Pollard cites

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[11] Under some federal nondiscrimination statutes, a constructive discharge occurs "when an employer creates intolerable working conditions in a deliberate effort to force the employee to resign." *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994); *Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993) (citing *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)), *cert. denied*, 513 U.S. 806 (1994). "A plaintiff alleging constructive discharge must ... prove two elements: deliberateness of the employer's action, and intolerability of the working conditions." *Bristow*, 770 F.2d at 1255 (emphasis added), *cert. denied* 475 U.S. 1082 (1986); *see also Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354 (4th Cir. 1995); *Johnson*, 991 F.2d at 131. The determination of whether the employee's working conditions are intolerable is based on the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign. *See Munday v. Waste Management of N. Am. Inc.*, 126 F.3d 239, 244 (4th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998); *Bristow*, 770 F.2d at 1255. The Fourth Circuit has acknowledged that the "traditional standard of constructive discharge ... does not neatly translate to the context" of failure to accommodate claims. *See Johnson*, 991 F.2d at 131-32. As I mention in the text, there is no authority for the proposition that the Maryland Court of Appeals would apply these standards to state law claims. In any event, no reasonable fact finder could conclude that these standards are satisfied by the available evidence in this case.

no cases to support this theory, she has not proffered evidence to create a factual issue as to whether her working conditions were purposefully made so intolerable that she was forced to quit.

Pollard concedes that Area Supervisors are required from time to time to cover the shifts of absentee Store Clerks and Store Managers. She also acknowledges that after her return from surgery, she rarely if ever completed an eight hour work day as a Store Clerk in the Hereford store. She acknowledges that each time she informed Sheehan of her need to depart early for the day because of discomfort caused by her back, he never imposed upon her any condition that she remain at work or suffer adverse consequences. She does not assert that she was denied the assistance of her co-workers to implement the lifting and bending restrictions imposed by Dr. Brager. These facts undercut her constructive discharge claim. Apart from these allegations Pollard does not claim that she was otherwise mistreated by High's although she mentions some friction with employees at the store to which she was assigned and that she felt humiliated by High's insistence that she work as a clerk prior to resuming her supervisor duties. Thus, while Pollard did file a workers' compensation claim in January 1998, the record reveals little more than that she left her job nine months later. Accordingly, I shall grant summary judgment as to the abusive discharge claim.

V

For the reasons set forth above, defendant's motion

for summary judgment shall be granted. An order follows.

Filed: November 21, 2000

ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY D. POLLARD,	*	
Plaintiff,	*	Civil Action No.: AMD 99 CV 3455
v.	*	
HIGH'S OF BALTIMORE, INC.,	*	
Defendant.	*	

* * * * * * * * *

ORDER

In accordance with the foregoing Memorandum, it is this 21st day of November, 2000, by the United States District Court for the District of Maryland ORDERED

(1) That the defendant's motion for summary judgment is GRANTED and JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANT; and further

(2) That the Clerk of the Court shall CLOSE THIS CASE and TRANSMIT copies of this Order and the foregoing Memorandum to counsel of record.

_____

ANDRE M. DAVIS
United States District Judge

Supreme Court, U.S.
FILED
JUL 26 2002
OFFICE OF THE CLERK

No. 01-1885

IN THE

Supreme Court of the United States

MARY D. POLLARD,

Petitioner,

v.

HIGH'S OF BALTIMORE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

NORMAN R. BUCHSBAUM
Attorney for Respondent
Inner Harbor Center, Suite 600
400 East Pratt Street
Baltimore, Maryland 21202
(410) 332-1343

174974

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties identified in the Petition for Writ of Certiorari are the only parties to this proceeding, *i.e.*, the Petitioner is Mary D. Pollard, an individual, and the Respondent is High's of Baltimore, Incorporated.

High's of Baltimore, Incorporated, is a privately owned company and all of the stock of High's of Baltimore, Incorporated, is owned by the Darnell family. High's of Baltimore, Incorporated, does not have any parent corporation and there is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation between High's of Baltimore, Inc. and Petitioner.

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STATEMENT OF THE CASE[1]

I.

Mary D. Pollard (hereinafter "Petitioner" or "Pollard") worked for Respondent (hereinafter "High's") since 1985. In 1997 Petitioner worked as an Area Supervisor responsible for about ten (10) stores, regularly working on average seventy (70) hours per week on a recurring basis, and "on-call" 24-hours per day, seven (7) days per week, for emergencies.[2] In August, 1997, Petitioner hurt her back on the job. She continued to work, however, until August 29, 1997, when her physician, Dr. Renzo Ricci, certified that she was incapacitated for the period from August 29, 1997, to September 7, 1997. Pollard returned to work on September 8, 1997, without any work restrictions and worked until December 11, 1997. At that time, Petitioner prepared for back-surgery which took place in January, 1998. Dr. Myles Brager performed the back surgery. (App. p. 2a) (L56, L62).

While Pollard recuperated from surgery, she filed a worker's compensation claim and employed an attorney to represent her in that claim — Barbara Porter, Esquire. Porter wrote to High's District Manager, Patricia Kelly, Petitioner's

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1. Respondent's "Lodging," (page numbers of which are cited herein as "L__"), contains documentation supporting facts recounted in this "statement of the case" as well as a copy of the February 6, 2001, Memorandum and Order of the District Court in *Pollard* denying Pollard's Motion to Amend or Alter Judgment.

2. High's submitted seven (7) affidavits in support of its Motion for Summary Judgment from High's personnel attesting to the rigors of the Area Supervisor position. Included in the Lodging to this Brief is Linda L. Lee's affidavit, which attests to the normal weekly hours worked by High's Area Supervisors.

immediate supervisor, and advised High's to direct all future inquiries concerning Pollard to Porter's attention and not to contact Pollard directly. Porter eventually was replaced by Wesley Blakeslee, Esquire, who corresponded with High's' workers' compensation carrier, Montgomery Mutual Insurance Companies ("MMIC")'s attorneys regarding Pollard's claim. As a consequence of Porter's letter, from Pollard's surgery in January, 1998, through late-August, 1998, High's did not contact Pollard directly nor did Pollard contact High's directly during this entire time period. (App. p. 3a) (L76, L51).

It was not until August 25, 1998, that Pollard herself called District Manager Patricia Kelly directly and told Kelly she was anxious to return to her job. MMIC had retained a rehabilitation consultant, Alberto Felix, who worked to coordinate Pollard's return to work with High's Operations Manager, Timothy D. Sheehan — who responded positively to the idea of Pollard's returning, noting Pollard had been a dedicated worker and good employee. (App. pp. 3a, 19a) (L62, L152).

On September 4, 1998, Felix met with both Dr. Myles Brager, Pollard's physician, and Pollard to discuss her ability to return to work. After this meeting, Felix received a copy of Dr. Brager's notes regarding Petitioner, which stated:

> Patient is doing quite well with normal activities of daily living. She is spending more time in and out of a car. Overall I think there is no question that she is now ready to go back to work at 8 hours per day, and I think we can even increase her lifting limit to 25 pounds. I still do not want her to do repetitive bending. We will do this for

> several weeks. I will see her in one month and re-evaluate her at that time for further return to normal duties at work.

(App. p. 8a) (L69).

On September 18, 1998, Felix, Timothy Sheehan, the Operations Manager for High's, and Pollard met at High's to discuss Pollard's return to work, including her recovery accommodation needs and what High's could do to accommodate her. It was determined, as a result of that meeting, that Petitioner was unable to perform the job requirements of the Area Supervisor position but that she could perform in a light-duty, modified store clerk position, wholly accommodating of her lifting and bending restrictions, in the interim while she worked to regain her capacity to perform the Area Supervisor position. There was not at this meeting, or anytime afterwards, any suggestion by High's that Pollard would not or might not ultimately return to her job as an Area Store Supervisor. (App. p. 7a) (L15, L62).

Petitioner began working on September 23, 1998, but transitioned slowly. As it turned out, despite her doctor's September 4, 1998, evaluation, she was never to actually work even a single full eight (8) hour day. She worked in the position for six (6) weeks thereafter and never worked more than four (4) to five (5) or six (6) hours a day. On September 29, 1998, Petitioner obtained a follow-up examination from Dr. Brager, who noted that Pollard's "physical examination today reveals normal gait with good mobility throughout" and that:

> I feel at this time Mary is ready to return to her regular work, unlimited hours, with the only

> restriction being that she not lift more than 25 pounds or that she not bend on a repetitive basis.

(App. p. 9a) (L15, L70).

Petitioner informed Sheehan that Dr. Brager had released her to work unlimited hours and therefore she should be able to return to her Area Supervisor position. However, Sheehan determined Petitioner's work performance to date had not yet demonstrated the physical capacity for unlimited work hours because she had not been able to work even a full eight (8) hour shift once, let alone the seventy (70) hours per week the typical High's area supervisor worked. Accordingly, Sheehan advised Pollard she would have to remain in the modified store clerk position until fully ready to return to her normal position. (App. p. 11a) (L15).

Throughout October, 1998, Pollard never asked High's for any additional accommodation(s) in the store-clerk position beyond the full accommodation of her lifting and bending restrictions and flexibility in shift hours. Pollard made no other complaint to High's about her working conditions other than her expressed desire to return soon to her Area Supervisor's position. But again, not working even a full day on a single occasion, among her other restrictions, required Petitioner's remaining in the interim store-clerk position until she progressed, as expected, to a capacity to assume the Area Supervisor position. (App. pp. 9a-11a) (L48).

Pollard herself repeatedly admitted in her deposition that the sales-clerk assignment was understood by all as a temporary assignment. She admitted that although she had not, by the time she resigned, proved an ability to work an

eight (8) hour day, let alone the seventy (70) hour week normally worked by High's Area Supervisors, no one at High's indicated they thought she was permanently, physically foreclosed from that position. She admitted she was unable to work a full eight (8) hour day, despite her working only primarily in running the cash register and making deli sandwiches. Based on this, Sheehan regarded her as not yet then able to resume the Area Supervisor's position — though not permanently disqualified. (L20, L21).

Unbeknownst to High's management, Petitioner was feeling humiliated and frustrated in her interim position and sought new employment elsewhere. After just six (6) weeks working part-time in the modified store-clerk position, Petitioner accepted an offer of employment with a car dealership and left her employment with High's on or about October 29, 1998, without giving prior notice to High's. (App. p. 11a) (L53-L55).

Two (2) years later, in July, 2000, in response to High's Motion for Summary Judgment, Petitioner obtained an affidavit from Dr. Myles Brager in which he stated in July, 2000, that he had believed Petitioner had been permanently disabled since early 1998, as she was significantly and permanently "restricted as to the condition, manner and duration under which she can perform each of the activities of standing, sitting, lifting, bending, stooping, squatting, kneeling and remaining in one position." (App. p. 10a) (L77).

Dr. Brager's affidavit offered no explanation as to why in 1998 he had not informed Petitioner or High's of that opinion, that Petitioner was permanently disabled, or otherwise reconcile his 1998 opinions that Petitioner was expected to improve to full working capacity. (App. p. 10a)

(L77). A fair reading of Dr. Brager's notes in 1998 — at the critical junctures — made plain that his July, 2000, affidavit prepared by Petitioner's counsel, cannot as the trial judge and appellate panel both found, be reconciled.

Additionally, during the summer of 2000, Petitioner obtained two (2) vocational expert reports prepared on the basis of Dr. Brager's revised 2000 medical opinion of Petitioner's condition. Those two (2) reports by Kathleen Sampeck and Lianne Friedman had not been made known to High's except upon summary judgment proceedings in the summer of 2000, well after the late summer and early fall of 1998, the critical time period here. (App. p. 10a).

As of the Fall of 1998, High's had absolutely no knowledge of medical or vocational rehabilitation opinions to the effect that Petitioner was, before she resigned her employment with High's in the Fall of 1998, permanently disabled and foreclosed from a broad class of jobs as later asserted by Brager, Friedman and Sampeck. (App. p. 9a).[3]

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3. In fact, while Petitioner's Brief, p. 3, begins with paragraphs about the physician and physical therapist "opining", to whom did they so opine and when? Dr. Brager's notes in September, 1998, were that Pollard could work as an area supervisor with only the 25-pound lifting limitation — and no hours restriction. Mr. Brager, the vocational rehabilitation therapist, admitted at his deposition that he never shared his opinion and views of Pollard with High's, although he knew that High's would have been the most natural recipient for him to express them. (L27-L41).

REASONS FOR DENYING THE WRIT

I.

THE PETITION MUST BE DENIED BECAUSE THE PETITION MISSTATES FACTS IN THE RECORD BELOW AND BEGS AN EVIDENTIARY QUESTION RULED UPON BY THE DISTRICT COURT BELOW AND NOT PROPERLY PRESENTED IN THE PETITION

There is no reason for this Court to exercise its discretion to review Petitioner's appeal under Sup. Ct. R. 10 where the Petition fails to disclose the complete record below and impliedly asserts a misstatement about the nature of the medical testimony addressing the issue of "substantial limitation."

The appendix to the Petition includes a copy of the Decision and Order of the Fourth U.S. Circuit Court of Appeals in this case, No. 01-1342 (February 25, 2002). The appendix also includes the November 21, 2000, Memorandum and Order granting summary judgment to Respondent High's by U.S. District Judge Andre M. Davis of the United States District Court for the District of Maryland. However, the Appendix inexplicably fails to include Judge Davis' February 5, 2001, Memorandum and Order denying Pollard's December 7, 2000 Motion to Amend or Alter Judgment. (A copy of Judge Davis' February 5, 2001, Memorandum and Order is included in the "Lodging" submitted with this brief. Petitioner's Appendix also omits the Fourth Circuit's denial of Pollard's petition for rehearing *en banc*.

Pollard's Motion to Amend or Alter Judgment claimed Judge Davis improperly refused to consider post-litigation affidavit statements made by Dr. Myles Brager in July, 2000, retrospectively opining Pollard was substantially limited by her back injury impairment as of January, 1998. Dr. Brager's 2000 retrospective medical opinion directly contradicted his own medical opinion in 1998 as set forth in his several notes in Pollard's medical records.

Dr. Brager's 1998 notes, contemporaneous with the circumstances underlying this case, demonstrated his opinion in 1998 that the impairments Pollard sustained as a result of her back injury and surgery were improving and expected to improve so that she could resume full employment as an Area Supervisor. For example, Dr. Brager's August 18, 1998, note provided that "there is a good chance that after an initial 'break in' that [Pollard] will be able to get back to the kind of work that she had done in the past". Additionally, Dr. Brager's September 4, 1998, note provided that "Patient is doing quite well with normal activities of daily living . . . [and Dr. Brager would see Pollard in one month to] "re-evaluate her at that time for further return to normal duties at work". Furthermore, Dr. Brager's September 29, 1998, evaluation contained his opinion that Pollard was ready to "return to her regular work, unlimited hours . . .". (L69, L70) (App. pp. 7a-10a).

Both High's and Pollard had knowledge of Dr. Brager's 1998 medical opinion during the Fall of 1998 and both approached Pollard's returning to employment with High's in the Fall of 1998 based, in part, on Dr. Brager's 1998 medical opinion. (High's and Pollard also based their approach to her return based on Pollard's own assertions of her ability to work and in the demonstration of her own pace

of physical progress at work). The medical information available to both High's and to Pollard in 1998 comprised medical opinion that Pollard's impairment was of a temporary nature expected to improve to the degree that she could return to her normal full-time employment status as an Area Supervisor. Pollard was placed in a temporarily modified light-duty store-clerk position, based on this information, with full accommodation of her temporary lifting and bending restrictions, her inability to work a full day and without limitation as to her own pace for increasing her strength and endurance.

The Petition relies upon masking this important detail where on page 3, paragraph 2, it states: "[a]n orthopedic physician has opined that, on a permanent basis, Petitioner's back injury significantly restricts her . . .". Without any knowledge of the complete record below and the entirety of medical evidence considered by High's, one would fail to ask the most pertinent of questions with regard to this Petition statement — *i.e.*, "opined to whom at High's and when?" High's contends that as the answer to "when" and "to whom at High's" an orthopedic physician opined the permanency of Pollard's limitations is "July 2000" (two years after Petitioner's resignation from employment) and "no one at High's" (in July 2000 or the Fall of 1998), then the Petitioner's reliance on this evidence as a basis for appeal to this Court is simply without merit.

According to Petitioner, Dr. Brager's July, 2000, affidavit, although directly contradicting his own 1998 medical opinion, and albeit prepared post-litigation, justifies certiorari review to decide the question whether ". . . the ADA's definition of disability covers a back impairment that, according to expert medical testimony, significantly restricts

an individual, as compared to the average person . . .". However, this simply misrepresents the nature of the basis for the Fourth Circuit's decision to affirm the District Court. For any rational court could hardly gainsay that properly founded, fact specific and relevant expert medical testimony of an individual's back impairment significantly restricting major life activities supports finding a "disability". What Petitioner contends, is that *retrospective* medical testimony by the same physician who provided directly contradictory opinion two (2) years previously, which *retrospective* opinion was unavailable to anyone at the Petitioner's employer at the time for determining her status, should be relied upon to impose liability on an employer, retrospectively, for violating the ADA.

In Judge Davis' February 6, 2001, Memorandum and Order denying Pollard's Motion to Amend or Alter Judgment, he stated:

> Contrary to Pollard's argument . . . [that the Court wrongly disregarded the July 2000, affidavits of Dr. Brager] . . . I did not 'disregard[ ]' Dr. Brager's post-litigation statement set forth in his affidavit. Indeed, for the purpose of High's summary judgment Motion, I assume to be true Dr. Brager's statement of July 14, 2000, that he believed Pollard to be 'permanently disabled and had been since at least January, 1998'. Nevertheless, Dr. Brager's post-litigation opinion was irrelevant to the critical issues before me on summary judgment namely: (1) whether, *prior to Pollard's voluntary resignation from her employment with High's*, Pollard had attained the status of a 'qualified individual with a disability' under the

> ADA and, (2) the further issue (one that was inextricably bound up with the first) of whether High's was on notice that Pollard was 'disabled' rather than simply temporarily physically impaired, within the meaning of the ADA *during the six week period between Pollard's return to work from back surgery and her voluntary resignation.*
>
> I concluded on the record before me that despite her extended, months-long, absence from work (in consequence of her back surgery and related recuperation), that upon her return to the workplace, during which she was assigned to a position other than her regular job and for the six weeks prior to her resignation, Pollard did not attain the status of a 'qualified individual with a disability' in respect to her job of Area Supervisor for High's and that, therefore, as a matter of law, she was not, during those six weeks, entitled to the protections afforded by the ADA. I further concluded that, as a matter of law, there was no genuine dispute of material fact as to whether High's knew, or could have known, during a relevant period of time, that Pollard's impairment was of such a nature as to impose upon High's the duties required of an employer covered by the ADA.

(L2-L3) (Emphasis in original).

This Court has already stated, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481-489 (1999) that in order for ADA protection (or liability) to attach, the ADA

". . . requir[es] that a person be presently — not potentially or hypothetically — substantially limited in order to demonstrate a disability". Consistent with this, the Fourth Circuit properly considered all of the medical opinion available *in 1998*, including Dr. Brager's and another physician's — Dr. Rosenthal's, all of which indicated Pollard's condition could not be viewed, *in 1998*, as a permanently impaired condition. With respect to Dr. Brager's July, 2000, change of opinion, the Fourth Circuit stated in footnote 3:

> . . . Contrary to Pollard's assertion, Dr. Brager's revised opinion and the opinions of her hired vocational experts, based on that 2000 report, do not affect our analysis under the ADA because 'the date of an adverse employment decision is the relevant date for determining whether a plaintiff is a qualified individual with a disability . . . And as the district court noted, there does not appear to be any "authority in the case law interpreting the ADA to allow a medical practitioner's *nunc pro tunc* opinion to contradict his own contemporaneous opinion concerning a patient's disability in order to shore up a discrimination claim.

(App.10a).

Thus, Petitioner misstates that at the time of the events underlying this case, there was no information available to either High's, or to Pollard, *or to the physicians treating Pollard and reviewing her case*, that she was substantially limited or permanently limited in her major life activities. The July, 2000, retrospective opinion of Dr. Myles Brager

(and the vocational expert reports premised upon that July, 2000, retrospective opinion) did not constitute evidence that in the Fall of 1998, at the time she resigned her employment from High's, Pollard was disabled. In 1998, Dr. Brager did not tell anyone or note that he thought Pollard was disabled — and if he did think so back then, he offered no explanation in his July, 2000, affidavit to reconcile his 1998 written contrary statements. Thus, the July, 2000, affidavit of Dr. Brager was not relevant to determine Pollard's then 1998 condition. It failed in foundation and specificity precisely because of the existence of his irreconcilable 1998 opinions.

Because Petitioner has not properly represented the relevant record below and begs an evidentiary issue not properly presented, the Petition must be denied.

II.

THE PETITION ASKS THIS COURT, AS A CONDITION TO DETERMINING THE QUESTIONS PRESENTED, TO FIND WORKING AS A MAJOR LIFE ACTIVITY WHERE THIS COURT HAS NOT HERETOFORE RULED AND THE PARTIES BELOW DID NOT BRIEF OR ARGUE THE ISSUE. AS SUCH, THE PETITION REQUIRES REVIEW OF AN ISSUE NOT PROPERLY PRESENTED OR RIPE FOR DETERMINATION AND IT MUST BE DENIED.

The "Questions Presented" in the Petition ask the Court to define ". . . the standards for determining whether the ADA's definition of disability covers a back impairment that . . . according to expert vocational testimony, forecloses that individual from more than seventy percent (70%) of jobs in the relevant labor markets" and ". . . the standards for

determining whether an employer regards an individual with an impairment as disabled in one or more major life activities, including working." Both of these questions ask the Court to decide in the first instance that "working" is a major life activity, when this Court has not done so before. *See Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 184 (2002). ("Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much as we need not decide this difficult question today"). *See also Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (The Court assumed without deciding that working is a major life activity).

In *Toyota* and *Sutton*, the issues regarding "substantial limitation" did not arise from questions seeking an ultimate determination of an *actual* disability arising from a substantial limitation to working.[4] Contrariwise, the Petition here asks this Court to determine evidentiary standards for establishing an *actual* disability based upon a claimed substantial limitation to working. However, because neither party has put into dispute whether working is a major life activity, and this Court has not heretofore made that determination, the evidentiary questions Pollard presents in her Petition are not ripe for this Court's review. They beg the conditional determination that working is a major life activity.

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4. The issue in *Sutton* had to do with whether or not the employer "regarded" the plaintiffs as disabled by "regarding" them as substantially limited in their capacity to work.

III.

THE PETITION MUST BE DENIED BECAUSE IT FAILS TO IDENTIFY A CONFLICT AMONG THE COURTS OF APPEALS ON A QUESTION OF LAW UNDER THE ADA, OR, THE QUESTIONS PRESENTED ARE TOO FACT SPECIFIC AND INCAPABLE OF PRECEDENTIAL EFFECT.

A. There is no conflict between the Fourth Circuit and other Courts of Appeals, or with this Court, about the application of an individualized inquiry into the issue of "substantial limitation" of a major life activity.

Petitioner has identified no conflict with this Court or with the courts of appeals with regard to the legal framework or standard for determining the existence of a substantial limitation to major life activities, including working. Petitioner claims the Fourth Circuit deviated from this Court's rulings in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 151 L. Ed. 2d 615 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 417 (1999) and conflicted with four other Courts of Appeals[5] by failing to conduct an individualized inquiry in *Pollard*. According to Petitioner, this is demonstrated by the Fourth Circuit's improper reliance on "doctors' notes" — a reliance alleged to be at odds with the Third Circuit. Additionally, Petitioner asserts, the Fourth Circuit, at odds with *Sutton*, *Toyota*, and the Sixth Circuit, failed to consider Petitioner's education, skills, and training. Furthermore, the Fourth Circuit, at odds with the Sixth Circuit, improperly relied on evidence of Pollard's having taken a job at a car dealership. Finally, the

5. The Seventh, Sixth, Eighth and Third.

Fourth Circuit's ultimate failure, according to Petitioner, was finding no evidence (or evidence raising a genuine issue of fact) that Petitioner's physical restrictions were substantially limiting of any major life activities when there are cases out there that have found otherwise in seemingly similar circumstances.

What Petitioner is really arguing against, however, is that the Fourth Circuit's application of the individualized inquiry in this case resulted in a determination that Pollard failed to produce the requisite measure of evidence of a disability. Although Petitioner produced some evidence addressing the issue of her limitations, it was not sufficient to raise a genuine issue for trial *about her own experience of a significant restriction in her major life activities in the Fall of 1998* – when she resigned her employment from High's. (*See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). (*See also Toyota, supra*, and *Sutton, supra*, (in order to establish an actual disability, not only must there be evidence of a physical or mental impairment, there must also be evidence of substantial limitation in a major life activity relative to the plaintiff's own experience).

In this case, the relevant[6] evidence adduced on the issue of whether Petitioner was disabled within the meaning of

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6. The Fourth Circuit agreed with the District Court that Dr. Brager's July, 2000, affidavit was not relevant to the issue of Pollard's disability, and neither were the vocational expert reports based on Dr. Brager's July, 2000, *"nunc pro tunc"* observations. (App. p. 10a). The point of contention on this evidence is addressed in Respondent's first argument in this Brief. It is interesting that Dr. Brager's note of September 4, 1998, almost foreshadows this Court's discussion of major life activities in *Toyota*, when Brager observes that Pollard ". . . is doing quite well with normal activities of daily living." (App. 8a) (L69).

the ADA in the Fall of 1998 included medical records, physician and rehabilitation counselor opinions, Petitioner's own assertions and her demonstrated work performance, including her resignation to accept new full-time employment elsewhere. None of this evidence demonstrated that Petitioner's physical restrictions could be viewed as permanent in 1998, not even by her attending physician. *See Toyota*, 151 L. Ed. 2d at 631 (An impairment must be permanent or long-term to be substantially limiting). Brager's 1998 notes make clear that Pollard is, in his contemporaneous opinion, on the road to full recovery and only needs a little transition for a temporary period. Additionally, none of this evidence addressed how Petitioner's restrictions substantially limited her in her daily life activities, anyway, as contemplated by this Court in *Toyota*. There was no evidence that routinely lifting 25 or more pounds or engaging in repetitive bending or stooping was of central importance to Petitioner's daily life. *See Toyota*, *supra*, 151 L. Ed. 2d 615, 630 (An impairment is not substantial if only interfering in a minor way — plaintiff needs to produce evidence of significant restrictions). Relative to working as a major life activity — Petitioner's evidence, again, was not sufficient to raise a genuine issue of material fact for trial. A *temporary* restriction to performing several discrete job duties does not rise to the level of a disability under the ADA. Petitioner's evidence fell below that measure of evidence necessary to demonstrate a substantial limitation to the major life activity of working, even assuming that this Court were to find that working is a major life activity. She produced no relevant evidence to rebut the substantial evidence of the temporary nature of her limitations as understood by High's in the Fall of 1998. She also produced no relevant evidence that she was foreclosed from a broad class of jobs in the Fall of 1998 — let alone her own pre-injury job with High's — before

she resigned her position from High's. There must be evidence the impairment substantially limits employment generally rather than in just one job or in a narrow range of jobs. *See Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir. 2001) (Plaintiff's "inability to lift 45 pounds for a long period of time . . . and inability to drive a forklift for more than four hours a day . . . do not constitute a significant restriction on one's capacity to work"). *See also McKay v. Toyota Motor Mfg. USA, Inc.*, 110 F.3d 369, 373 (6th Cir. 1997) (Plaintiff was not disabled because she was unable to do repetitive motion factory work, where this inability did not foreclose her from a broad class of jobs). *See also Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (A twenty-five (25) pound lifting restriction cannot constitute a significant restriction to the major life activity of working as compared to the average person's lifting capacities). *See also Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8th Cir. 2001) (A lifting restriction standing alone is insufficient to demonstrate a substantial limitation to working).

None of the circuit court cases cited in Petitioner's Brief conflict with the Fourth Circuit's decision in *Pollard*. None of the cases demonstrate that the evidence in this case, first and foremost indicating a temporary impairment, was sufficient to raise a genuine issue of fact of substantial limitation to major life activities of lifting, bending, stooping, or working. The cases cited by Petitioner demonstrate that the questions presented on this Petition are fact-specific and thus incapable of precedential effect.

Cochrum v. Old Ben Coal Company, 102 F.3d 908 (7th Cir. 1996), *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000), *Webner v. Titan Distribution, Inc.*,

267 F.3d 828 (8th Cir. 2001), and *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998) each fail to demonstrate a conflict with the Fourth Circuit's decision in *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir. 2002). In each of these cases, unlike in *Pollard*, there was no evidence of a present inability to view the plaintiffs' impairments as permanent, whereas all of the information available here in 1998 was that Petitioner's impairments were temporary. Additionally, the physician or vocational expert opinion supporting the finding of disability in the cases cited by Petitioner implicated no issue about relevance, lack of foundation or specificity. In *Pollard*, on the other hand, the retrospective opinion of Dr. Brager and the vocational expert reports based on that opinion were found not relevant. (App. 10a). In any event, High's could not have known about them, and did not, in the relevant time period, in the Fall of 1998.

Significantly, moreover, the cases cited by Petitioner were decided before this Court's decision in *Toyota*, as well as more recent case law from the same Circuits, following *Toyota*, which call into doubt those earlier cases Petitioner cites or distinguish their findings from *Pollard*. For example, the finding of no disability by the Seventh Circuit in *Stein v. Ashcroft*, 284 F.3d 721 (7th Cir. 2002) and *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir.), *cert. denied*, 122 S. Ct. 62 (2001) is reconciled with the finding of disability by the Seventh Circuit in *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908 (7th Cir. 1996), based on the breadth of the plaintiff's limitations. The limitations in *Cochrum v. Old Ben Coal Company*, 102 F.3d 908 (7th Cir. 1996) comprised "no" overhead work, heavy lifting, or pulling or pushing out from the body and supported finding a disability. This contrasted with the limitations in *Contreras v. Suncast*, 237 F.3d 756

(7th Cir.), *cert. denied*, 122 S. Ct. 62 (2001), which comprised a forty-five (45) pound lifting restriction and a prohibition against strenuous work which the Seventh Circuit found could not "constitute a significant restriction on one's capacity to work." *Id.* at 763. *Pollard*, similar to *Contreras*, presents a case of limited lifting and bending restrictions and is distinguishable from *Cochrum*.

In *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000), the Sixth Circuit emphasized the district court's finding of disability was not at odds with other cases involving seemingly similar impairments and applications, because the application of the individualized inquiry in *Burns* demanded a different result. Even if the *Burns* decision showed some conflict between the Sixth and Fourth Circuits — it was a short-lived conflict, where, as of June 28, 2002, the Sixth Circuit commented in *Mahon v. Crowell* No. 00-6134, __ F.3d __ (6th Cir. 2002) (L8) that *Burns* was decided before *Toyota* and on a less than demanding standard for determining whether a plaintiff was substantially limited in the major life activity of working.

In *Mahon* the court found the plaintiff, a steamfitter, was not disabled by his herniated disc and resulting restrictions on bending, lifting and climbing because those restrictions alone could not constitute a substantial limitation to working. The vocational expert's analysis produced by the plaintiff opined the plaintiff was foreclosed from steamfitter-classed jobs based on his assertion that he could not perform steamfitter job duties. However, the evidence demonstrated contrariwise — that right after plaintiff's injury, he was employed as a steamfitter, albeit with restrictions. Moreover, the plaintiff asserted his continued qualification as a steamfitter. (L8, L12).

In *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001), the court acknowledged that a lifting restriction standing alone was insufficient to demonstrate a substantial limitation to working[7]. *Id.*, 267 F.3d at 834. In *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998), the court likewise acknowledged that evidence of an impairment alone was not enough to show substantial limitation to working. *Id.*, 162 F.3d at 784. *Webner* and *Mondzelewski* simply do not conflict with the Fourth Circuit's decision in *Pollard*. Pollard's restrictions prohibiting her from lifting 25 pounds and engaging in repetitive bending and stooping did not prove she was foreclosed from a broad class of jobs when she produced no relevant evidence of that foreclosure — or even that she was foreclosed from her own job with High's.

Thus, there is no demonstrable conflict between the cases cited by Pollard and the Fourth Circuit's decision in *Pollard*, because they are all factually distinguishable — precluding a pro forma result from the application of an individualized inquiry.

Additionally, Petitioner's claim that the Fourth Circuit improperly failed to consider Petitioner's education, skills, and training does not raise an issue for review because there is no conflict between the Fourth Circuit and any other Circuit identified by Petitioner on this matter. The relevant evidence in this case indicated that in 1998 Petitioner's limitations were viewed as temporary by her doctor, her employer and by Pollard herself. Moreover, the evidence indicated that

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7. The Plaintiff's vocational expert analysis and report in *Webner* which supported finding substantial limitation to working was not questionable relative to relevance as were the vocational expert reports, based on retrospective medical opinion, in *Pollard*.

Petitioner was not even foreclosed from her job with High's. Given this, the further vocational-type inquiry normally associated with plaintiffs foreclosed from their normal employment and facing long-term employment impact was not even relevant in *Pollard* and it was not improper for the Fourth Circuit not to pursue it. *See Burns v. Coca-Cola Enterprises*, 222 F.3d 247 (6th Cir. 2000). *See also Deppe v. United Airlines*, 217 F.3d 1262 (9th Cir. 2000) (relevant medical opinion asserted plaintiff lost one-half of his pre-injury capacity for lifting, and bending and this was "permanent and stationary" and plaintiff "most likely would be unable to return to his position as a line mechanic"). In any event, unlike in the cases cited by Petitioner, the Fourth Circuit had no relevant, timely, vocational expert evidence to consider, in the first instance.

Likewise, the Fourth Circuit's decision does not conflict with the general admonishment that a plaintiff may nonetheless be foreclosed from a broad class of jobs even if obtaining employment in one job. *See Webb v. Garelick Mfg. Co.*, 94 F.3d 484 (8th Cir. 1996), *See also DePaoli v. Abbott Labs.*, 140 F.3d 668 (7th Cir. 1998)[8]. In this case, however, the crux of the matter is, again, that Petitioner produced no relevant evidence that in 1998 she had a permanent impairment and was foreclosed from a broad class of jobs. Given this, the Fourth Circuit properly viewed her resignation from High's to accept new employment elsewhere as

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8. Petitioner's reference to *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001) simply does not support Petitioner's argument, where the employer in that case asserted it could not have regarded the plaintiff as disabled because she was able to work at another job. Here, High's asserted it did *not* regard Petitioner as disabled because it thought her work limitations were temporary — not simply because she obtained employment elsewhere.

"*reinforc*[*ing*] [the court's] *conclusion* [based on all the evidence] that Pollard was not substantially limited in the major life activity of working". (App. p. 11a) (emphasis added)[9].

Finally, Petitioner's assertion that the Fourth Circuit's reliance upon the numerous and fact-specific doctor's notations in this case conflicted with the Third Circuit and justified review borders on the frivolous. The Third Circuit, in *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999), rejected any determination of a lack of disability based on a doctor's singular note that was *a conclusory one-liner* that the plaintiff there was "able to return to work and is not disabled". The Third Circuit noted that the particular doctor's note in question "could hardly [be] conclusive proof that [the plaintiff] was not substantially limited". *Id.*, 184 F.3d at 310-311. Petitioner did not even attempt to reconcile the difference in the nature and scope of the doctor's conclusory note in *Taylor* with the fact-specific explanatory *series* of doctor's notations in *Pollard* — even while arguing this "conflict" in the treatment of doctor's notes between the Third and the Fourth Circuits justifies certiorari review. For this lack alone, the Petition must denied.

B. The Fourth and Sixth Circuits do not conflict on the standards for determining whether an individual is "regarded" as disabled.

Contrary to Petitioner's assertions otherwise, there was no evidence before the Fourth Circuit that High's regarded Pollard as disabled within the meaning of the ADA, and the

9. We note that nowhere in the Petition does Pollard protest the Fourth Circuit's affirmance that Petitioner was not constructively discharged from her employment and that she voluntarily resigned it. (App. pp. 12a-14a).

Fourth Circuit's decision does not conflict with the Sixth Circuit. The physician and vocational expert opinions of the summer of 2000 were never given to High's at any relevant time — only months after litigation had been initiated at the federal district court level and then, only after discovery had ended and High's had filed a dispositive motion. The only medical and rehabilitation opinions available to High's, at any material time, were those in 1998 stating clearly that Dr. Brager thought Petitioner was expected not only to improve (but could not immediately perform her Area Supervisor's position) but was "ready" to do her old job. Just because High's accommodated Petitioner's temporary needs as it perceived them does not mean High's regarded Petitioner as disabled. There is nothing in *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001) that would compel a different finding. In *Henderson*, again, unlike in *Pollard*, there was no substantial evidence the employer there perceived the plaintiff's limitations as temporary.

CONCLUSION

For all the above reasons, we submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

NORMAN R. BUCHSBAUM
Attorney for Respondent
Inner Harbor Center, Suite 600
400 East Pratt Street
Baltimore, Maryland 21202
(410) 332-1343

Dated at Baltimore, Maryland
this 26th of July, 2002.

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED AND FILED FEBRUARY 6, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 99-3455

MARY D. POLLARD,

Plaintiff

v.

HIGH'S OF BALTIMORE, INC.,

Defendant

MEMORANDUM

On November 21, 2000, I granted summary judgment to defendant High's of Baltimore, Inc., in this vigorously contested discrimination case instituted by a former employee of High's pursuant to the Americans With Disabilities Act ("ADA"). Plaintiff has filed a timely motion to alter or amend judgment, to which High's has filed an opposition. The issues have been fully briefed and no hearing is necessary.

Although Federal Rule of Civil Procedure 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, the Fourth Circuit has "recognized that there are three grounds for

amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at [the time of decision]; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Pollard relies exclusively upon her contention that my earlier memorandum contains clear errors of law that must be corrected to prevent manifest injustice. I am not persuaded that I committed clear errors of law or that injustice results from the entry of judgment in favor of defendant, but several of Pollard's contentions bear mention.

Pollard argues that I "wrongly disregarded the affidavit statements of Dr. Brager," her treating physician, when I concluded that those statements provided no basis upon which a jury could find that Pollard qualified as disabled under the ADA during the time that she was employed by High's. Pollard cites Fourth Circuit case law for the proposition that a district court cannot disregard a witness affidavit on summary judgment on the basis that the affidavit contradicts the witness' prior statements. *Vathekan v. Prince George's County*, 154 F.3d (4th Cir. 1998); *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993)

Contrary to Pollard's argument, however, I did not "disregard[]" Dr. Brager's post-litigation statements set forth in his affidavit. Indeed, for the purposes of High's summary judgment motion, I assumed to be true Dr. Brager's statement of July 14, 2000, that he believed Pollard to be "permanently disabled and had been since at least January 1998."

Nevertheless, Dr. Brager's post-litigation opinion was irrelevant to the critical issues before me on summary judgment, namely; (1) whether, *prior to Pollard's voluntary resignation from her employment with High's*, Pollard had attained the status of a "qualified individual with disability" under the ADA and, (2) the further issue (one that was inextricably bound up with the first) of whether High's was on notice that Pollard was "disabled," rather than simply temporarily physically impaired, within the meaning of the ADA, *during the six week period between Pollard's return to work from back surgery and her voluntary resignation.*

I concluded on the record before me that despite her extended, months-long, absence from work (in consequence of her back surgery and related recuperation), that upon her return to the workplace (during which she was assigned to a position other than her regular job) and for the six weeks prior to her resignation, Pollard did not attain the status of a "qualified individual with a disability" in respect to her job of Area Supervisor for High's and that, therefore, as a matter of law, she was not, during those six weeks, entitled to the protections afforded by the ADA. I further concluded that, as a matter of law, there was no genuine dispute of material fact as to whether High's knew, or could have known, during the relevant period of time, that Pollard's impairment was of such a nature as to impose upon High's the duties required of it as an employer covered by the ADA.[1]

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1. Pollard's heavy reliance on case law from outside the Fourth Circuit, particularly federal and state cases arising in the Ninth Circuit, is duly noted. It may be that the Fourth Circuit will embrace a similarly expansive interpretation of what transient physical

(Cont'd)

I based this reasoning, in part, upon testimony about what Pollard herself repeatedly communicated to High's about her readiness and ability to return to full-time active duty as an Area Supervisor. I also based this reasoning on the contemporaneous notes of Dr. Rosenthal, the workers' compensation carrier physician who oversaw Pollard's "work hardening" program, documenting that Pollard continued to improve and would soon improve to the degree that she could return to full-time work without restrictions. Finally, and most importantly, this reasoning was also supported by Dr. Brager's *contemporaneous treatment notes and his orders based thereon*, which explained that Pollard *was likely* to make a full recovery and *was expected* to make a full recovery, documented her improvement over several months, and progressively removed restrictions to allow her unlimited hours of work.[2] Never once during Pollard's six week resumption of job duties (prior to her resignation) did Dr. Brager, Pollard's (then) attorney or Pollard herself inform High's that she was (or might be) anything other than temporarily impaired. *Indeed, there was no medical evidence upon which to form such a conclusion at that time.* Thus, as I reasoned in my opinion, as a matter of law, Pollard was not a "qualified individual with a disability" in respect to her

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(Cont'd)

limitations (thought by the employee and her treating physician, as well as the employer, to be strictly temporary impairments nearing complete resolution), entitle the employee to ADA protection and impose reciprocal statutory duties upon an employer. But the Court has not yet done so.

2. Dr. Brager maintained the prohibition against lifting anything heavier than 25 pounds and against repetitive bending.

job as an Area Supervisor, and no reasonable jury could conclude by a preponderance of the evidence that High's violated the ADA by failing to afford Pollard a "reasonable accommodation." Nor could a reasonable juror conclude by a preponderance of the evidence that High's intentionally took adverse employment actions against Pollard on account of a "disability" under the ADA.

The fortuity that almost two years later, in July 2000, and in the course of litigation which no one could have anticipated at the time Pollard resigned from her employment, Pollard's treating physician realized the the inaccuracy of his earlier prognosis as to Pollard's likely recovery, does not alter the fact that as far as anyone knew or could predict back in the fall of 1998, Pollard was only temporarily impaired and on the way to full recovery. Pollard's lack of patience with the pace of her own recovery and with High's willingness to overlook her manifest inability to work the requisite hours to resume the (higher paying) Area Supervisor position is a regrettable historical fact. But that is exactly what it is — a historical fact — and Dr. Brager's affidavit, based on 20/20 hindsight, cannot be read as if the opinion he expressed in the summer of 2000 was anything like the one he had reached in the fall of 1998, when it would have greatly mattered to Pollard and to High's.

Pollard also argues that this "Court has wrongly concluded that Plaintiff is not substantially limited in major life activities." She argues this error is demonstrated by undisputed evidence that "plaintiff suffered intense pain while working as a [S]tore [C]lerk." It is true, of course, that Pollard never completed an eight hour shift as a Store Clerk

once she returned to work on September 23, 1998. And I accepted as true her contention on summary judgment that even with the modified job duties High's provided to her (no heavy lifting, no repetitive bending), she found the Store Clerk position so physically demanding that it caused her great pain. However, an employer is entitled to rely upon an employee's statements about her work capabilities and it is entitled to rely upon the medical documentation which an employee provides about her capabilities. Those statements and that medical documentation indicated quite clearly that she was only temporarily impaired and would soon be able to perform as she once had. Indeed, as of September 29, 1998, Pollard was insisting that she was presently able to perform her former position as Area Supervisor.

I granted summary judgment to High's on Pollard's state law claim for constructive abusive discharge because she failed to proffer evidence to create a "factual issue as to whether her working conditions were purposefully made so intolerable that she was forced to quit." I noted in passing (in a footnote) that Pollard had failed to cite any law to support her assertion that Maryland recognized a cause of action for *constructive* abusive discharge, but I accepted that Maryland law did support such a claim for the purposes of the motion. In her present motion, Pollard now cites *Beye v. Bureau of Nat'l Affairs*, 59 Md.App. 642, 653, 477 A.2d 1197, 1203, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984), for the proposition that Maryland recognizes such a cause of action. The Court of Special Appeals held in *Beye* that the Maryland standard for evaluating whether an employee was constructively discharged "is whether the employer has deliberately caused or allowed the employee's working

conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign." *Id.*; *accord Moniodis v. Cook*, 64 Md.App. 1, 11-12, 494 A.2d 212, 217, *cert. denied*, 304 Md.631, 500 A.2d 649 (1985). Pollard thus confirms that I applied the proper legal standard in evaluating this claim. Accordingly, there is no warrant for granting her motion to alter or amend the judgment as to this claim.

Pollard has argued that I have committed several other "legal errors." I have considered her arguments in these regards and find them to be without merit.

For the reasons explained above, I shall deny Pollard's motion to alter or amend judgment. A separate order follows.

Filed: February 6, 2001

s/ Andre M. Davis
Andre M. Davis
United States District Judge

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 25, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1342
CA-99-3455-AMD

MARY D. POLLARD

Plaintiff - Appellant

v.

HIGH'S OF BALTIMORE, INCORPORATED

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
Patricia S. Connor
CLERK